TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~192~~ 211.

PHINEAS PAM-TO-PEE AND OTHERS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 11, 1901

(18,351.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 498.

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INDEX.

	Original.	Print.
Petition	1	1
Traverse	8	7
Findings of fact	9	8
Conclusion of law	10	10
Opinion of the court	11	10
Judgment of the court	14	15
Appeal and allowance of same	15	15
Clerk's certificate	16	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1901.

1 In the Court of Claims.

PHINEAS PAM-TO-PEE and THREE HUNDRED AND Sixty-two Other Indians
vs.
THE UNITED STATES. } No. 21300.

1.—*Petition Filed April* 22, 1899.

To the Court of Claims:

The petition of Phineas Pam-to-pee and 362 other Indians whose names hereinafter appear respectfully shows:

That in 1833 the Pottawatomie with two other tribes of Indians had a large reservation on the west shore of Lake Michigan. Scattered bands of that tribe also had three small reservations aggregating 164 sections of land in southern Michigan. The tribe also were entitled to annuities under twelve treaties, six of which were temporary and six perpetual. September 26, 1833, they with the other tribes ceded the reservation west of Lake Michigan to the United States and agreed to remove west of the Mississippi river but the Michigan bands refused to join in the treaty, and the next day supplementary articles were added in which these bands joined whereby the Michigan reservations were also ceded and a portion of the tribe residing in Michigan were given permission to remove to the northern part of the State, the United States agreeing that in case of such removal that a just proportion of all former annuities and those under that treaty should be paid them at L'Arbre Croche. Thereupon a large proportion of them removed to northern Michigan, but a portion of the Nottawasepi and Pokagon bands of the tribe remained in southern Michigan and yearly from 1843 to 1866 were paid a part of what was promised them by the treaty.

2 Your petitioners further show that differences arising as to the rights of the Indians not removing west of the Mississippi river and the duty of the Government in the premises in order to judicially determine the same, the Congress passed an act which was approved March 19, 1890, entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana" whereby the court was authorized to take jurisdiction and to try all questions of difference arising out of treaty stipulations with said Indians, and to render judgment thereon, as by the said act in the 26th Statutes at Large at page 24 will appear and to which reference is had, under which suits were commenced by your petitioners and others of said Indians in this court upon matters arising out of stipulations contained in said treaties, one of the suits being entitled—Phineas Pam-to-pee and 1,371 other Pottawatomie Indians of Michigan and Indiana against The United States (No. 16842) and the other entitled—The Pottawatomie Indians of Michigan and Indiana against The United States (No. 16743). Both suits being to recover the same annuities under the same treaties and there being

Indians in both suits entitled to share in such unpaid annuities, the two suits were consolidated and such proceedings were therein had that afterwards on the 27th day of June, 1892, by the consideration and judgment of said court in the consolidated case aforesaid, your petitioners herein with other Indians parties hereto, recovered of and from the United States the sum of $104,626 that being the amount of said annuities found by the court to be due and unpaid them at that date, but also establishing thereby their right to the perpetual annuities mentioned as well, the court designating and deciding that the Indians entitled to the just proportion of the unpaid annuities mentioned in the supplementary article referred to in the treaty of September 26th and 27th, 1833 and for whom and their descendants said judgment was rendered, were those parts of the Nottawasepi and Pokagon bands of Pottawatomies to whom the payments aforesaid were made in southern Michigan from 1843 to 1866.

3 And your petitioners state that they are a portion of the Indians in whose favor said judgment was rendered, some of them being Indians to whom said payments were made and others descendants and heirs respectively of those to whom said payments were made, and all being Indians designated and described by said court as those parts of the Nottawasepi and Pokagon bands of the Pottawatomies to whom the payments aforesaid were made in southern Michigan from 1843 to 1866 or descendants and heirs of those Indians so designated and described, the names of your petitioners being as follows:

1 Phineas Pam-to-pee,
2 Rodney Pam-to-pee,
3 Frank Pam-to-pee,
4 Jacob Pam-to-pee,
5 George Pam-to-pee,
6 Johny Pam-to-pee,
7 James David,
8 Mrs. Sarah David,
Their grandchildren,
9 Albert Mackety,
10 Betsy Mackety,
11 Mrs. Ida Mackey,
Children,
12 Frank Mackey,
13 Alice Mackey,
14 Mee-me Shaw-go-quate,
15 Mrs. Elizabeth Shaw-go-quate,
Children,
16 Isaac Edward,
17 Thomas Wezoo,
18 Mrs. Rosa Wezoo,
Children,
19 Mary Wezoo,
20 Elizabeth Wezoo,
21 Lucy Wezoo,

22 Martha Shaw-go-quate,
Children,
23 Angeline Shaw-go-quate,
24 Lewis Shaw-go-quate,
25 Mary Shaw-go-quate,
26 Mrs. Sarah Isaac,
27 Jacob Jackson,
28 William Caw-caw-be,
29 Mrs. Mary L. Caw-caw-be,
30 John Pam-to-pee,
31 Mrs. Mary Pam-to-pee,
32 Samuel Pam-to-pee,
33 David Nottaway,
34 Mrs. Josephine Nottaway,
Their children,
35 Peter Nottaway,
36 William Nottaway,
37 Phebe Nottaway,
38 Samuel Nottaway,
39 Julia Nottaway,
4 40 John Pam-to-pee, Jr.,
41 Mrs. Jane Pam-to-pee,
Children,
42 Mary Pam-to-pee,
43 Angeline Pam-to-pee,
44 Silas Pam-to-pee,
45 Phineas Pam-to-pee, Jr.,
46 Levie Pam-to-pee,
47 Elizabeth Pam-to-pee,
48 George Pam-to-pee,
49 Mrs. Phoeba Pam-to-pee,
Children,
50 John Pam-to-pee,
51 Henry Pam-to-pee,
52 Lucy Ka-kak,
53 Mary Mackey,
54 Samuel Mandoka,
55 Mary Mandoka,
Children,
56 Ida Mandoka,
57 Guyly Mandoka,
58 Grover Mandoka,
59 Joseph Mandoka,
60 Frank Mandoka,
61 Angeline Mandoka,
62 George Mandoka,
63 John Mackey,
64 Gust Mackey,
65 Jennie Johnson,
66 Mrs. Mary Alexis,
67 Children, one,

68 Amos Watson,
69 Stephen Pam-to-pee,
70 Mrs. Agnes Pam-to-pee,
71 Henry Birch,
72 Makey Shaw-go-quot,
73 Stephen Pam-to-pee and wife,
75 Moses P. Wakazoo, wife and son,
78 Joseph P. Wakazoo,
79 John Wakazoo and three sons,
83 David Au-gosa, wife and three sons,
88 Pash-kish-go-quay and son,
90 David Fox and son,
92 Lewis Medawis, wife and five children,
99 Alice Jackson and four children,
104 James Pigeon, wife and three children,
109 John Pigeon, wife and son,
112 Foster Crampton, wife and three children,
117 Saws-way, wife and child,
120 Levi Franssway, wife and child,
123 Mock-tay-waw,
124 Samuel Pay-co-tush,
125 Pay-she-ge-zhick and wife,
127 Three children of Shaw-o-ne-ge-zhick,
130 William McClure, wife and three children,
135 Joseph Sha-go-na-by, wife and six children,
143 Alexander Sha-go-na-by,
144 Peter Medawis, wife and four children,
150 Sampson Pigeon,
151 James Johnson,
152 Betsey Walker and three children,
156 George Walker and wife,
158 Caroline Walker,
159 Peter Thompson and wife,
161 Alfred Mark, wife and two children,
165 D. K. Foster, wife and child,
168 Lucy Foster,
169 Charles W. Foster,
170 Lincoln P. Foster,
171 James Foster,
172 Moses Foster,
173 John Macktay and wife,
175 Samuel Macktay,
176 Kelsey Isaac, wife and two children,
180 Ada Bennett and child,
182 Peter Oh-she-da-yah-sunk, wife and four children,
188 William Chippeway, wife and three children,
193 Edward Kay-kake and child,
195 Frank Kay-kake,
196 Isaac Kay-kake,
197 Nin-way-quay,
198 Ke-way-je-won, wife and child,

201 Kate Sha-go-na-by and five children,
207 Abrim Halfaday,
208 James Halfaday,
209 Samuel David,
210 Nancy Halfaday and two children,
213 John Battice and three children,
217 Lewis Battice,
218 Ching-gwan and wife,
220 George Ching-gwan, wife and two children,
224 Sin-mo-quay and two children,
227 George Mo-gwaw-go,
228 Henry Ketosh,
229 Simon Ketosh,
230 Caroline Ketosh,
231 Five children of Wallace Hinman,
236 Julia Pigeon,
237 Lewis Petoskey, wife and three children,
242 Bazel Petoskey,
243 Enos Petoskey,
244 Elizabeth J. Petoskey and two children,
247 James Petoskey, wife and three children,
252 Thomas F. Petoskey,
253 Jane Petoskey and two children,
256 Agnes G. Taylor,
257 Mary Lathrop,
258 Mary O. Peterson,
6 259 John Petoskey, wife and two children,
263 Frank Petoskey,
264 William F. Petoskey and Jane Petoskey,
266 Margaret Ke-way-din,
267 Moses Ash-quab, wife and four children,
273 Betsey John,
274 Solomon David and two children,
277 James Sau-ga-maw,
278 James Lewis and two children,
281 Joseph Bush,
282 Lucy Pokagon and two children,
285 Mary Taw-caw-waw-gay and child,
287 Emma Pepeyar and two children,
290 John Marso,
291 John Green,
292 Peter Gibson,
293 Mary Sha-sha-gway,
294 Frances Sha-sha-gway,
295 Maggie Cobmosay,
296 Joseph F. Sha-sha-gway,
297 William Sha-sha-gway, wife and five children,
304 Joseph Snay, wife and two children,
308 John Snay, wife and two children,
312 Eliza Fisher,
313 Theresa C. Snay,

314 Minnie Snay,
315 William J. Eness and three children,
319 Joseph Eness and child,
321 Lewis Eness and two children,
324 Emos Eness and child,
326 Henry Eness and child,
328 Pay-maw-me,
329 Mary Embre,
330 Lewis Thomas,
331 Nah-o-ge-zhick and two sons,
334 Nancy Kaw-o-sod, wife and four children,
340 Peter Willis,
341 Jacob Willis and two children,
344 Alexander La Line, wife and four children,
350 Jamie Riley,
351 Nancy Riley,
352 Julia La Line,
353 Elizabeth La Line,
354 Mary B. La Line,
355 John Jacobs,
356 Shaw-bo-way and child,
358 Peter Mackey,
359 Sarah Naw-zhe-way-quay and daughter,
361 David Bennett,
362 Na-so-we-din-no-quay,
363 Moses Ke-ma-ge-ma.

(NOTE.—*The names are not numbered in the original petition on file.*)

7 That said judgment was affirmed in the Supreme Court of the United States on appeal and the same still remains in full force unreversed and unpaid, so far as your petitioners are concerned, nothing having been paid them or either of them thereon.

They further state that by an act approved August 23, 1894, the Congress appropriated $104,626 to pay upon said judgment—28 Stat. at Large, 450—and by an act approved August 15, 1894, it appropriated $6,243.90 to apply upon the perpetual annuities established by the judgment—28 Stat. at Large, 295—and by an act approved March 2, 1895, it further appropriated $2,081.30 to apply upon said perpetual annuities—28 Stat. at Large, 885—and lastly by an act approved June 10, 1896, the Congress capitalized said perpetual annuities as ascertained by said judgment, and appropriated $43,707.30 to pay them in full—29 Stat. at Large, 330—the whole of said appropriation amounting to $156,658.50; each and all of them being made by Congress to pay the claim established by the judgment aforesaid to the claimants recovering the same, part of whom are your petitioners as aforesaid, the Commissioner of Indian Affairs being charged with the distribution of the funds to your petitioners and the other Indians in whose favor the judgment in said consolidated case was recovered subject only to the payment of the amount due for legal services rendered in the

prosecution and recovery of the same, but while $105,025.07 of said money was distributed among 273 of the Indians, none of it was paid your petitioners although equally entitled thereto. That in fact the defendant paid no part of the funds so appropriated by the Congress for that purpose to your petitioners or to either of them, but so to do although often requested, refused.

That so far as your petitioners can ascertain, the Indians recovering said judgment and entitled to share in the funds so appropriated to satisfy the same number, 636, each being entitled to an equal part thereof, whereof your petitioners are entitled to 363 parts or shares, the other 273 Indians interested in it having been paid—but they file this petition on behalf of themselves and all others entitled (if any there be) who may choose to come in and share therein, and as the exact number having a right to share in the judgment and funds mentioned is now uncertain, your petitioners ask a judgment for such proportionate amount thereof as the evidence may show they are entitled to on the trial of the case and that this may be allotted and awarded to them severally.

8 No assignment or transfer of said claim or any part thereof or interest therein has been made to your petitioners' knowledge or belief, and the claimants are justly entitled to the amount herein claimed after allowing all just credits and offsets.

JNO. B. SHIPMAN,
Attorney for Petitioners.

Address: Coldwater, Michigan.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

Before me the undersigned appeared John B. Shipman, attorney for the above-named petitioners, and made oath that he is the authorized attorney of the Indians named as petitioners in the foregoing petition in the matter therein mentioned. That he knows the contents of said petition and that the matters therein stated are true so far as the same are stated on his knowledge and as to the matters therein stated on the knowledge, information or belief of the petitioners, he believes them to be true.

Dated, Washington, April 22nd, 1899.

[NOTARIAL SEAL.] GEORGE W. TAYLOR,
Notary Public.

II.—*Traverse. Filed April* 18, 1901.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against

the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney General.

V.

9 Court of Claims.

III.—*Findings of Fact and Conclusion of Law. Filed May* 20, 1901.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

Under the act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana approved March 19, 1890 (26 Stat. L., 24), two suits were brought in this court, one entitled The Pottawatomie Indians of Michigan and Indiana *v.* The United States, No. 16743, and the other, Phineas Pam-to-pee and 1,371 Other Pottawatomie Indians of Michigan and Indiana *v.* The United States, No. 16842.

II.

On the 8th day of January, 1891, the court ordered the two cases to be consolidated, to the end that the adverse claims of the two bodies of claimants might be heard and disposed of by one trial and judgment.

On the 27th day of June, 1892, judgment was rendered therein against the United States for $104,626. The claimants in both causes appealed to the Supreme Court. The judgment so appealed from was affirmed and the mandate of the Supreme Court was filed in this court on the 20th day of April, 1893.

The petitions of the respective parties in the two cases above named, the judgment so rendered as above stated, and the mandate of the Supreme Court affirming the same are appended and form part of this finding.

III.

In June, 1895, the Secretary of the Interior ordered and directed that a census of the Indians be made under the act 2d March, 1895 (28 Stat. L., 894). The census-roll was prepared under instructions of the Commissioner of Indian Affairs, dated June 8, 1895—approved by the Secretary of the Interior June 15, 1895—by John W. Cadman, and is known as the "Cadman census-roll." While the agent was so engaged in taking the census, John B. Shipman, Esq., attorney of record in the case of Pam-to-pee *v.* United States, addressed a communication to the Secretary of the Interior, dated July 27, 1895, representing that such census, by reason of the manner in which it was being taken, would omit many Indians entitled to be paid under the judgment of the court. Before further instructions were given by the Secretary of the Interior the agent Cadman, in

August, 1895, made and returned and filed in the Interior Department the census so made by him.

After this roll had been prepared many applications for enrollment were received by the Commissioner of Indian Affairs, based upon the statement that while such applicants were not on the roll of 1866 they were on prior rolls from 1843 to 1866, or were the descendants of such persons. The question was then submitted to the Secretary of the Interior for an opinion as to whether the rolls from 1843 to 1866 should be considered in connection with the enrollment of those who were entitled to participate in the distribution of the $104,626 awarded by the Court of Claims.

On January 10, 1896, the Secretary of the Interior made his final decision in regard to the Indians who should be enrolled and paid under the judgment of this court and the appropriation of Congress. Marcus D. Shelby, a special Indian agent, was designated by the Commissioner of Indian Affairs to examine and report upon the claims of the several parties alleging to be descendants of the Pottawatomie Indians of Indiana and Michigan, who were permitted by supplemental clause to the treaty of September 27, 1833, to remain East, and for whom the Court of Claims rendered a decision in their favor of $104,626 June 27, 1892. The instructions given to
10 the agent by the Commissioner were dated February 5, 1896.

The agent so designated proceeded to Michigan and reported the result of his investigation, bearing date March 14, 1896. The report so made was accepted by the Secretary of the Interior as substantially correct, and the amount appropriated by Congress in satisfaction of the judgment of this court (28 Stat. L., 450) as well as other funds appropriated to pay the Indians upon treaties mentioned in the petitions in said suits (the sum paid being $118,554.52) paid to the persons upon the roll made by Cadman, after adding thereto two names on the recommendation of Shelby in closing his report as persons mentioned on the census-roll by Inspector Cadman but not found on the roll of 1866. Later one more was added by the department. The money was paid to the Indians as communal owners, that is to say, it was paid *pro rata* to every living member of that portion of the tribe entitled to participate in the funds and not *per stirpes*.

The instructions of the Commissioner of Indian Affairs to Cadman June 8, 1895; the letter of John B. Shipman July 27, 1895; the decision of the Secretary of the Interior January 10, 1896; the instructions given to the agent, Shelby, February 5, 1896, and the report of the agent March 4, 1896, are appended and form a part of this finding.

Enclosed in the said letter of John B. Shipman was a list containing the names of over one hundred and fifty of the claimants herein, the names of their ancestors and number on the pay-roll of 1843 and 1844 being given as stated in the letter.

IV.

None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them, to wit, 272, whose

names are set forth in Schedule A annexed to claimants' request for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844 and 1866. A portion of the Indians who remained in Michigan as coming within the exemption treaty of September 27, 1833, were represented in both petitions in the cases of The Pottawatomie Indians *v.* The United States, and The Pam-to-pee Indians *v.* The United States.

V.

Pursuant to a stipulation of the parties, the facts stated in the findings of fact and in the opinion of the court in cases 16743 and 16842 as reported and set forth in 27 Court of Claims Reports, p. 403, are found as additional facts in this case.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants' petition should be dismissed.

And it is further ordered that the claimants' request for findings of fact be refused as irrelevant and immaterial, except so far as the same are found in the findings of the court and appear upon the records of the former cases, Nos. 16743 and 16842.

BY THE COURT.

11 IV.—*Opinion of the Court. Filed May* 20, 1901.

NOTT, Ch. J., delivered the opinion of the court:

When the former cases were before the court (27 C. Cls. R., 403), in which the present claimants were represented, it was found as a fact (*ib.*, p. 408) that the number of Pottawatomie Indians who remained in Michigan under the treaty of 1833 was 291, and the number who removed to the West was 2,812; and it was held that the just proportion of those who remained in Michigan, in certain tribal funds, would amount, June 30, 1892, to $17,630.67. To this "just proportion," $17,630.67, was added balances of annuities and other funds, bringing up the amount for which judgment was rendered to $104,626.

It is unfortunate for some of the claimants in the present suit that the evidence upon which they now rely was not before the court then. In the former cases the parties who were represented by the suit of The Pottawatomies *v.* United States took the ground that they were Indians and descendants of Indians in Michigan who had been recognized by the administrative branch of the Government as being entitled to remain in Michigan under the supplemental article of the treaty of 1833. The parties represented by the suit of Pam-to-pee *et al. v.* United States contended that the others had neither complied with the terms of the treaty by moving to the West, nor with the supplemental article of the treaty by moving to the north; and they stood, accordingly, upon the ground that they, who had complied with the supplemental article, were the only Indians entitled to par-

ticipate in the tribal funds. The court deemed itself bound by the action of the Government in recognizing the parties represented by the former suit, and accordingly rendered judgment for them; but the court did not undertake to determine who the then existing individual claimants were who were entitled to participate in the distribution.

To ascertain the proportional amount of the common fund which should be distributed the court resorted to the first rolls which had been made by the Indian Office after the treaty of 1833, viz., those of 1843–'44, and to a summary of the roll of 1866.

The present claimants accept the judicially determined facts of the former controversy as incontrovertible, but they allege and endeavor to prove that they are Indians or descendants of Indians who were upon the rolls of 1843 and 1844, and that they have not been paid.

It now appears that the ascertained fund—the judgment—was paid to only 272 Indians, a number slightly less than the number of Indians existing in 1833; and this diminished number is striking because the fund was distributed as communal property—that is to say, both parents and children took *per capita* as members of the community. If it had been an ordinary case of distribution according to common-law rules, there would be, say, two grand parents living, who alone would be entitled to be paid. But in a case of communal property there would be two grand parents, and, say, four parents, and, say, sixteen grandchildren, a total of twenty-two persons, all equally entitled to share in the fund. The claimants in the present suit bring the number of descendants up to 544 persons.

The gravamen of the claimants' case is this: The Secretary of the Interior directed that a census, so called, be made of Indians entitled to participate in the judgment. On the 27th of July, 1895, the agent of the department being still in the field and engaged in the work, the claimants' attorney addressed a letter to the Secretary of the Interior calling his attention to the fact that the agent had taken as a basis of investigation a roll of the Michigan Indians made in 1866, and had excluded from consideration the rolls of 1843 and 1844; and he pointed out in his communication that this proceeding would work great injustice to persons or descendants of persons who had died between 1843 and 1866; and he insisted that the census should omit no one whose name was on those rolls which had been before the court. The Secretary of the Interior, on the 10th of January, 1896, after due consideration of the matter, decided that those should be enrolled who make satisfactory proof "that they were on one of the rolls taken in the years 1843 to 1866 inclusive, or are descended from some one on one of those rolls."

To this the claimants' counsel did not object; he had, indeed, suggested in his communication of the 27th of July, 1895, that that was the proper course to be pursued. But he insists that this was not done; that the order to do so, as well as the decision of
12 this court, was ignored; that no attention was paid to the list containing the names of Indians entitled to share in the

judgment fund; that no other census than Cadman's census-roll was ever made or attempted to be made.

The evidence does not altogether sustain the claimants' case. It appears, on the contrary, that the agent endeavored to carry out his instructions. His report to the Commissioner of Indian Affairs, March 14, 1896, shows that he traveled through the country where these Indians resided or were supposed to reside and notified them, so far as he could, to appear and prove their cases. In his report he said: "I found these people very badly scattered, and as they do not frequent post-offices, the notices prepared for me to be posted in the various post-offices, to give them notice of my coming, were of but little value. In nearly every instance, on reaching the vicinity of these Indians, I had to take teams and drive to their homes. I got, however, the newspapers to publish the principal points I would visit." A number appeared, some of whom claimed because their ancestors' names were on the rolls of 1843 and 1844, others because they had Pottawatomie blood in their veins. All of these applicants were rejected for various reasons, some because their proof was insufficient, some because they or their forefathers had allied themselves with other Indian tribes, some because their fathers' names had been erroneously placed, in the opinion of Indian agents, upon the former rolls and had been dropped from subsequent rolls. The investigation was hurried, and is to the judicial mind unsatisfactory; yet it cannot be said that the agent disregarded the rolls of 1843 and 1844. The evidence produced was to his mind insufficient and unsatisfactory to prove that the forefathers of those applicants had rightfully been placed upon those rolls. The evidence now produced to establish the fact that 272 of the present claimants are direct descendants of the Indians who were upon the rolls in 1843 and 1844 is not altogether satisfactory to the court, but in the absence of countervailing testimony it may be said to present a *prima facie* case.

If we turn to the legal record in the case the following facts appear:

The judgment which was recovered in this court on the 27th June, 1892, is in these words:

"The court, on due consideration of the premises, find for the claimants and do order, adjudge, and decree that the said Pottowatomie Indians do have and recover of and from the United States the sum of one hundred and four thousand six hundred and twenty-six dollars."

No decree was entered designating the individuals among whom the fund was to be distributed or directing the manner of distribution or the officer who was to make the distribution, such as were entered in former cases of Indian claimants. (Western Cherokees *v.* United States, 27 C. Cls. R., 1, 61; Journeycake *v.* United States, 28 *ib.*, 281, 319; Whitmire *v.* Cherokee Nation *et al.*, 30 *ib.*, 138, 177; decree entered March 18, 1895.)

The judgment above set forth in the case of the Pottawatomie Indians was appealed from by the claimants in the case of Pam-to-pee *v.* United States, but not by the United States (148 U. S. R., 691),

and was affirmed. The Supreme Court in its opinion said that it is contended with a great show of reason by the appellants—

"That the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently." (*Ib.*, 704.)

In regard to the individual Indians entitled to recover, the Supreme Court also said:

"But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians entitled to distribution are represented by the respective attorneys or agents."

At this point, if the former case had been a similar suit in chancery between ordinary litigants, it would have been referred to a master or referee to ascertain and report as to the individual claimants entitled to recover, and the final decree would not have been entered until a coming in and confirmation or correction of the master's report. The Secretary of the Interior, however, seems to have inferred from language in the opinions of the two courts that he was authorized to proceed and ascertain who those Indians were, and to prescribe the methods for so ascertaining and determining the amount to be distributed to each individual claimant. He apparently requested an appropriation from Congress to meet the expenses of the investigation; and Congress, by the act 2d March, 1895 (28 Stat. L., 894), enacted:

13 "That the Secretary of the Interior is hereby authorized and directed to detail or employ an Indian inspector to take a census of the Pottowatomie Indians of Indiana and Michigan who are entitled to a certain sum of money appropriated by Congress to satisfy a judgment of the Court of Claims in favor of said Indians. And for the purpose of making the payment to the Pottowatomie Indians of Indiana and Michigan of the one hundred and four thousand six hundred and twenty-six dollars, appropriated by the last Congress to satisfy a judgment of the Court of Claims, there is hereby appropriated the sum of one thousand dollars."

The appropriation above referred to, for the satisfaction of the judgment of this court, is in the sundry civil appropriation act, August 23, 1894 (28 Stat. L., 424, 450), and is in these words:

"For payment of judgments of the Court of Claims, as follows:

"To the Pottawatomie Indians of Michigan and Indiana, one hundred and four thousand and twenty-six dollars."

The Secretary of the Interior then appointed an agent to ascertain the names and number of the claimants entitled to be paid, and prescribed the means and methods for ascertaining them and the principles upon which the fund should be distributed, and the whole of the fund was paid away. Nevertheless, there is not a line in the judgment of this court or in any statute of Congress which empowered or authorized the Secretary to dispose of the fund.

These facts present a delicate if not difficult question. The coun-

sel for the defendants has taken the broad ground that the Government cannot be made to pay a second time; and if this were an ordinary case of the kind, the array of well-chosen authorities which he has presented would be overwhelming. But there is no case or authority cited which exactly meets the conditions of the present case. The defendants were not administrators, executors, or trustees paying involuntarily under the imperative order of a court; no court could have committed them for contempt if they had refused to pay, and their official representative, the Secretary of the Interior, was not without notice that there were claimants seeking to participate in the fund who also claimed to be within the letter and spirit of the court's decision.

The authorities cited by the counsel may be resolved into two general classes: one where an officer, such as an administrator or executor, pays away a fund under the coercion of a decree or order of a court having jurisdiction of the fund; the other, where an innocent stakeholder, without fault, negligence, or mistake, pays away a fund to the injury of a negligent party who fails to present his claim in due time. Apart from these authorities there is the great principle of equitable estoppel, that where a man remains silent when he ought to speak he cannot be permitted to speak when it will be to the injury of another person, who was misled by his silence. In this case the claimants knew, or could have known, that the census made by an agent of the Interior Department was returned and filed in August, 1895, and that the final decision of the Secretary of the Interior was made in January, 1896. So far the case seems clear. The resulting question is, Were the claimants bound to ascertain between that time and the payment of the fund during the month of November, 1896, that their names were on the pay-roll, or might they assume that the direction of the Secretary would be correctly carried out by his subordinates?

The court has reluctantly come to the conclusion that that burden rested upon the claimants. The documentary proceedings in the Interior Department were not completed when the order of the Secretary was made. His decision was his direction that a new pay-roll be made, and the circumstances required vigilance on the part of persons whose right to be there had not yet been determined by name to see that their names were duly placed upon the final pay-roll. It is the misfortune of these claimants that they did not do so.

14 The counsel for the claimants has cited the practice of courts of equity, and particularly the English courts, in requiring notice to be published in case of multitudinous defendants, requiring them to come in and assert their rights. But such notices are not given for the benefit of persons who have appeared in and have actual knowledge of a suit. These Indians were dwelling in a not very wide extent of territory; the subject of litigation was something of more than common interest to every one of them. Assuredly the act of Congress of March 19, 1890 (26 Stat. L., 24), authorizing them to bring suit in this court to determine their rights, the bringing of two suits by contesting claimants, the trial

of the cases, the decision of this court, the appeal to the Supreme Court, the decision of the Supreme Court, the appropriation by Congress for the payment of the judgment, the act of Congress authorizing a census to be made, and the taking of the census by an agent of the Interior Department were more than equivalent to the publishing of a notice in the newspapers.

The counsel for the claimants has urged with great earnestness that these parties for whom he appears are simple, friendless, and unlettered men, women, and children, knowing little of their own rights and utterly ignorant of legal proceedings. And that is true. But the former case, in which the court might have exercised the discretion of a court of equity and allowed parties to come in even after the decree and assert their rights, is closed; the judgment therein has been satisfied; the claimants stand directly upon their legal rights, and there cannot be one law for the intelligent and another for the ignorant.

The judgment of the court is that the petition be dismissed.

V.—*Judgment of the Court.*

PHINEAS PAM-TO-PEE and Others
vs.
THE UNITED STATES. } No. 21300.

At a Court of Claims held in the city of Washington on the 20th day of May A. D. 1901 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimants be dismissed.

BY THE COURT.

15 VI.—*Application for and Allowance of Appeal.*

PHINEAS PAM-TO-PEE ET AL.
vs.
THE UNITED STATES. } No. 21300.

From the judgment rendered in the above-entitled cause against the claimants May 20, 1901, the claimants, by their attorney, on the 29th day of June, 1901, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. SHIPMAN,
Attorney for Claimants.

Filed June 29, 1901.

Allowed.
November 30, 1901.

CHARLES C. NOTT,
Chief Justice.

16 In the Court of Claims.

PHINEAS PAM-TO-PEE and Others
vs.
THE UNITED STATES. } No. 21300.

I John Randolph assistant clerk of the Court of Claims hereby certify that the foregoing are true copies of the pleadings in the above-entitled cause, of the findings of fact, and conclusion of law, filed by the court,—of the opinion of the court,—of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 10th day of December A. D. 1901.

JOHN RANDOLPH,
Ass'l Clerk Court of Claims.

Endorsed on cover: File No. 18,351. Court of Claims. Term No. 498. Phineas Pam-to-pee and others, appellants, *vs.* The United States. Filed December 11th, 1901.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

PHINEAS PAM-TO-PEE ET AL. *v.* THE UNITED STATES. } No. 498. Appeal from the Court of Claims.

It is hereby stipulated between the counsel for the appellants and the Attorney General for the United States that the transcript of the record in this case from the Court of Claims, filed in this court December 11, 1901, is imperfect and defective in this, that there is omitted therefrom the appendix referred to in findings II and III of the Court of Claims in this case, and that there was also omitted from said transcript the claimants' request for findings of fact referred to in the conclusion of law of the Court of Claims in said case, which omissions have been supplied by the additional return to this court of the transcript of the record of said case made by the clerk of the Court of Claims and certified under his official seal, dated the 9th day of January, 1901,—and agree that said additional return hereto attached may be filed as an addition to the record in said case.

JNO. B. SHIPMAN,
Counsel for Appellants.
L. C. PRADT,
Assistant Attorney General.

In the Court of Claims.

PHINEAS PAM-TO-PEE and Others, Appellants, *versus* THE UNITED STATES. } No. 21300.

I, John Randolph, assistant clerk Court of Claims, by order of said court, hereby certify that the annexed copy of the requests of claimants for findings of fact with the accompanying Schedule "A"—and also the copy of the appendices to the findings of fact filed by the court and numbered II and III, shall be added to and form part of the record on appeal to the Supreme Court of the United States in the above-entitled cause which record was certified to said Supreme Court on the 10th day of December A. D. 1901.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9th day of January, 1902.

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

PHINEAS PAM-TO-PEE and Others
vs.
THE UNITED STATES.
No. 21300.

Claimants' Request for Findings of Fact.

Filed November 26, 1900.

The claimants, considering the facts hereinafter set forth to be proven and deeming them material to the due presentation of this case in the findings of fact, request the court to find the same as follows:

1. To judicially determine the claim of certain Indians against the United States, Congress passed an act entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana," approved March 19, 1890, (20 St. at L. 24) under which two suits were commenced in this court, one entitled "The Pottawatomie Indians of Michigan and Indiana *vs.* The United States No. 16,743," and the other, "Phineas Pam-to-pee and 1,371 other Pottawatomie Indians of Michigan and Indiana *vs.* The United States, No. 16,842."

Opinion in 27 Ct. Cl. 403.

2. The claimants in both of said cases were Indians who are embraced within the terms of said act of Congress and the claim stated in both petitions was for unpaid annuities under the same twelve treaties, six of which were temporary and six perpetual.

27 Ct. Cl. 403.

3. On motion of the defendant the two cases were consolidated and tried as one and judgment entered therein June 27, 1892, in favor of a portion of the Indians who were claimants and against the United States for $104,626, that being their portion of the annuities due and unpaid them up to that date under the twelve treaties mentioned in the petitions, but also establishing thereby their right to the annuities to grow due thereunder as well, which judgment was affirmed in the Supreme Court on the claimants' appeal.

27 Ct. Cl. 403.
148 U. S. 691.

4. The parties in whose favor said judgment was rendered are Indians who were in both of said suits as petitioners and claimants therein, a portion being in case No. 16,743 and another portion as claimants in case No. 16,842.

27 Ct. Cl. 403, finding 12.

5. The parties who recovered said judgment are those parts of the Pokagon and Nottawasepi bands of Indians and their descendants to whom annual payments were made by Government agents

in southern Michigan from the years 1843 to 1866 inclusive upon a portion of said annuities.

27 Ct. Cl., 403, opinion and findings 12 to 14.

6. The claimants in the case are all descendants and heirs of those parts of the Pokagon and Nottawasepi bands of Indians to whom the annual payments upon said annuities were made by Government agents in southern Michigan from the years 1843 to 1866 inclusive.

7. The claimants in this cause are a portion of the Indians in whose favor the judgment mentioned was rendered.

27 Ct. Cl. 403.

8. The total number of Indians recovering said judgment and entitled to share in its payment was 544 of whom 272 are claimants in this case.

9. To satisfy the judgment mentioned and the perpetual annuities thereby established (those being capitalized) Congress appropriated in all $156,658.50, the Commissioner of Indian Affairs being charged with the distribution of the funds.

10. So much of the funds appropriated as were distributed among the Indians, was paid to those whose names appeared upon the said annuity pay-roll of said Indians for the year 1866 and the descendants of those whose names there appear (except one descended from an Indian on the pay-roll of 1856) to the exclusion of all on the other pay-rolls for the year mentioned or who were descended from Indians whose names were upon any other than the roll of 1866.

11. No part of the money so appropriated as stated in request 9 to pay said judgment and the perpetual annuities thereby established, was paid to the claimants in this case nor was it paid to any or to either of them.

12. The claimants' part and proportion of said judgment is wholly unpaid.

13. The defendant, although requested so to do, has neglected and refused to pay the claimants their part or share of said judgment or of the said moneys appropriated to pay the same, or any part thereof.

14. The names of the 272 claimants in this cause who received nothing upon said judgment nor were paid any part of the fund appropriated to pay it, are contained and described in Schedule A hereto annexed.

15. $78,329.25 of the moneys appropriated by Congress to pay said judgment and the annuities thereby established as stated in the 9th request belong to the 272 claimants mentioned in request 14 and is wrongfully withheld from them by the defendant, the amount belonging to each being $287.97.

16. The sum of $78,329.25 upon the judgment and appropriations mentioned is due and unpaid the claimants in this cause from the defendant.

17. The claimants have no tribal origination and have adopted the habits of civilized life.

JNO. B. SHIPMAN,
Attorney for Claimant.

Schedule A.

Samuel Mendokay
Grover, Guyley and Austin Mendokay
Joseph Mendokay
Frank, Angeline and George Mendokay
Mary Mendokay
Ida Mendokay
Betsy Walker
Caroline Walker
Mrs. Rosa Wezoo
Mary, Lucy and Elizabeth Wezoo
James Johnson
Mrs. Joseph Sha-go-na-by
Her six children
Alexander Sha-go-na-by
Mrs. Peter Medawis
Helen, Johnson, Mary and Hannah Medawis
Sampson Pigeon
Solomon, Jacob, William and Hiram Walker
Mrs. Alfred Mark
Albert, Angeline and Jennie Mark
Sin-no quay
Her two children
John Pam-to-pee
Samuel, George, Henry and John (Jr.) Pam-to-pee
John Pam-to-pee (George's son)
Phineas Pam-to-pee
Rodney, Frank, Jacob, George and Stephen Pam-to-pee
Mary Ann Pam-to-pee
Johnny Pam-to-pee
Mary, Angeline, Silas, Levi, Elizabeth and Phineas (Jr.) Pam-to-pee
Mrs. Jane Pam-to-pee
Mee-me Shaw-go-quot
Mackey Shaw-go-quot
Joseph Mee-me
Mary, John and Gus Mackey
Jennie Johnson
Mrs. Mary Alexis
Thomas Alexis
William Caw-caw-be
Mary L. Caw-caw-be
Mrs. Josephine Nottaway
Peter, William and Samuel Nottaway
Mrs. Mary Pam-to-pee
David Nottaway
Amos Watson
Thomas Wezoo
Mrs. Agnes Pam-to-pee
Mary, Lucy and Elizabeth Wezoo
Mary Cob-cob-mo-sa
Mrs. Sarah David
Albert and Betsy Mackety
George Mo-gwaw-go
James David
Mrs. Ida Mackey
Frank and Alice Mackey
Mrs. Sarah Isaac
Henry Bireh
Emma Pepevar
Her two children
Joseph P. Wakazoo
Moses P. Wakazoo
John Wakazoo
John Wakazoo's four children
Mrs. David Au-go-sa
Her three children
Moses Ash-quab
Mrs. George Walker
Moses Ash-quab's three children
Betsy John
David Bennett
Pash-kish-go-quay
David Fox
Adam Fox
Mrs. Lewis Medawis
Sarah, Eliza Nancy, Henry and William McKinley Medawis
Mrs. James Pigeon
Mrs. John Pigeon
Alice Jackson
Alice Jackson's seven children
Foster Crampton
His three children
David K. Foster

Martha Shaw-go-quot
Angeline, Louis and Mary Shaw-go-quot
Isaac Edward
James Pigeon
Sarah Pigeon
Jane Pigeon
John Pigeon
Wallace Pigeon
Rosa Pigeon
Peter Thompson
Lucy Pokagon
Elliott Pokagon
Lucy Pokogon's other child
John Saws-way
Levi Fransway
His three children
Pe-nas-se-wat-no-quay
Nuck-quot
Samuel Pay-co-tush
Na-so-we-din-o-quay
Pay-she-ge-zhick
Shaw-o-ne-ge-zhick
William McClure
His three children
John Marso
William Chippeway
His three children
Nin-way-quay
Her three children
Amos Pay-maw-me
Albert Pay-maw-ne
Lewis Thomas
Edward Kay-kake
His grandchild
Frank Kay-kake
John Kay-kake
Isaac Kay-kake
Louis Ching-quash
Ke-way-je-won
His son
Ching-gwan
George Ching-gwan
Pe-nas-wa-gee-shick
Kate Sha-go-na-by
Her five children
Abrim Halfaday
Lucy, Charles, Lincoln, James and Inman Foster
Moses Foster
Mrs. John Macktay
James Halfaday
Nancy Halfaday
Her two children
James Sau-ga-maw
Samuel David
Solomon David
William J. Eness
His three children
Joseph Eness
His child
Lewis Eness
His two children
Enos Eness
His child
Henry Eness
His child
James Zoondah
His two grandchildren
Camburn Zoondah
Levi Zoondah
His two children
Peter Zoondah
Jacob Jackson
Lucy Kay-kake
John Battice
Lewis Battice
John Battice's four other children
Mary Sha-sha-gway
Frances Sha-sha-gway
Joseph F. Sha-sha-gway
William Sha-sha-gway
His five children
Joseph Snay
His three children
John Snay
His two children
Peter Mackey
Sarah Naw-zhee-way-quay
Her two children
Angeline As-sig-in-ac
William, Lucy, Frank and Mitchell As-sig-in-ac

Appendix to Finding II.

The Pottawatomie Indians of Michigan and Indiana
v.
The United States.
} No. 16743.

Petition. Filed April 14, 1890.

Petition.

To the honorable the Chief Justice and judges of the United States Court of Claims:

The Pottawatomie Indians of Michigan and Indiana, by the undersigned, their duly appointed agent and attorney, in behalf of all the Pottawatomie Indians of said States, respectfully represent:

First. That this petition is filed, and the jurisdiction of this court is invoked, under and by virtue of the provisions of the following act of Congress:

An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana.

* * * * * * *

Third. In the year 1795, and subsequently, the Government of the United States made treaties with the Ottawa, Chippewas, and Pottawatomie Indians, in which they were formally recognized as distinct nations uniting in the same treaties; but more recently they were known as the United Nation of Pottawatomies, and since 1846 as the Pottawatomie nation. By the provisions of the several treaties the Indians ceded lands to the Government, and the Government paid for the same in other lands, in money, and in goods and pledged annuities—some for a short and some for a long period.

On the 26th of September, 1833, a treaty was made by which the nation ceded to the United States about 5,000,000 acres of land lying on the western shore of Lake Michigan, for which the Government gave and pledged a satisfactory consideration.

A part of the nation did not at that time agree to the treaty, but the next day, being the 27th of September, 1833, those who had declined, and were known as the chiefs and head men of said United Nation of Indians, residing upon their reservations of land lying in the Territory of Michigan, south of Grand river, entered into a treaty supplementary to that which had been executed the previous day, by which they became parties to the main treaty, upon terms specified in the supplementary treaty—one of which permitted them to remove to northern Michigan and declared that in case of removal they should be entitled to share in all annuities payable under former treaties, and that arising from the sale of the reservation on which they then resided.

The Commissioner of Indian Affairs, in a letter addressed to the Secretary of the Interior, dated November 15, 1862, said that the main tribe removed to their new homes, west of the Mississippi, and

the Catholic portion, your petitioners and their forefathers, to the northern parts of Michigan; which is evidence that they complied with the condition upon which they were to share in the annuities due the nation.

This Government has made 24 different payments to your petitioners on account of their annuities since the treaty of September 27, 1833.

The nation was permitted to remain on the lands they ceded to the Government until 1836, and received all their annuities there, of which these petitioners received their portion down to and including the year 1835, prior to which time your petitioners made no claim against the Government.

Fourth. Your petitioners were parties to all treaties made by the United States with the Pottawatomie Nation of Indians, and were entitled to share *per capita* in all annuities secured to said nation by said treaties, and that no doubt should be permitted to cloud the title of your petitioners to share in the annuities secured by these several treaties, the supplementary treaty, dated September 27, 1833, was framed and ratified between the United States and your petitioners, the caption and first and last articles of said treaty being in the following words:

* * * * * * *

Twenty-first. Your petitioners further represent that the following payments have been made them by the United States since the treaty of September 27, 1833; total $75,162.50. (See letter of E. B. French, Second Auditor, dated March 27, 1872, and exhibits.)

The $1,587.50 was paid to those Pottawatomies residing in Michigan in conformity to, and as their proportion of, the treaty of July 29, 1829, and the second article of the supplementary treaty of September 26, 1833, for all the years that the same was paid, excepting for the years 1851 and 1865, in which years the treaty of 1833 is not included.

The payment of $39,000 in 1866 was made in conformity to the joint resolution of Congress approved July 28, 1866. (Vol. 14, U. S. Stat. L., p. 370.)

In 1843 Robert Stuart paid 253 Indians	$1,587.50
In 1844 Robert Stuart paid 269 Indians	1,587.50
In 1845 Wm. A. Richmond paid 217 Indians	1,587.50
In 1846 Wm. A. Richmond paid 204 Indians	1,587.50
In 1847 Wm. A. Richmond paid 244 Indians	1,587.50
In 1848 Wm. A. Richmond paid 260 Indians	1,587.50
In 1849 Chas. P. Babcock paid 260 Indians	1,587.50
In 1850 Chas. P. Babcock paid 218 Indians	1,587.50
In 1851 William Sprague paid 229 Indians	1,587.50
In 1852 William Sprague paid 214 Indians	1,587.50
In 1853 Henry C. Gilbert paid 219 Indians	1,587.50
In 1854 Henry C. Gilbert paid 236 Indians	1,587.50
In 1855 Henry C. Gilbert paid 236 Indians	1,587.50
In 1856 Henry C. Gilbert paid 221 Indians	1,587.50
In 1857 A. M. Filch paid 239 Indians	1,587.50

In 1858 A. M. Filch paid 234 Indians	1,587.50
In 1859 A. M. Filch paid 253 Indians	1,587.50
In 1860 A. M. Filch paid 236 Indians	1,587.50
In 1861 De Wit C. Leach paid 235 Indians	1,587.50
In 1862 De Wit C. Leach paid 247 Indians	1,587.50
In 1863 De Wit C. Leach paid 246 Indians	1,587.50
In 1864 De Wit C. Leach paid 242 Indians	1,237.50
In 1865 Richard M. Smith paid 232 Indians: Principal, in currency, $1,587.50; premium in gold, $692.24	2,279.74
In 1866 Richard M. Smith paid 338 Indians	39,000.00

The above shows the number of Pottawatomie Indians residing in Michigan in the years indicated who received the amount as shown thereon, as the same appears from the receipt rolls on file in the Indian Office.

* * * * * * *

Upon the foregoing statement there appears to be due from the United States to the Pottawatomie Indians of Michigan and Indiana the sum of $223,035.46, and your petitioners demand judgment for said sum.

JOHN CRITCHER,
Attorney for Plaintiffs.

PHINEAS PAM-TO-PEE AND 1,371 OTHER POTTAWATOMIE INDIANS OF MICHIGAN AND INDIANA
v.
THE UNITED STATES.
No. 16842.

Filed Nov. 5, 1890. J. R.

To the Court of Claims:

The petition of said Indians respectfully shows—

That your petitioners number 1,372, and their names and residences are as follows:

* * * * * * *

That your petitioners are not parties to the suit lately commenced in this court entitled: "The Pottawatomie Indians of Michigan and Indiana *v.* The United States" (No. 16743), and they are not represented therein; that the attorney appearing of record in said cause had and has no authority to act for them in the premises; that the agreement referred to in the jurat to the petition in said suit as the source of his authority shows that, August 25, 1887, 61 male and 30 female Indians residing in the counties of Cass, Van Buren, Berrien, and Allegan, Mich., and St. Joseph, Ind., signed a paper naming certain persons to act as a business committee for them in employing said attorney; and on the same day they held a meeting and elected one of their number as principal chief, who was to act with said committee in making the contract. September 29, 1887, this so-called principal chief and the business committee aforesaid, acting together and under the authority so conferred, made the con-

tract with the attorney referred to. It was acknowledged the same day in Van Buren county, Mich., and appears to have been approved in the Indian Office on the same day, although it was not acknowledged by parties in Washington until October 11, 1887. But it conferred upon said attorney no authority to act for any Indians other than the 91 mentioned. None of your petitioners were parties to or represented in any part of the transaction. Your petitioners have applied to the attorney in said cause for permission to take part in the suit and amend the petition therein so as to properly present the claim of all the Indians included in the said act of Congress, but said attorney refuses to accede to such request.

Your petitioners further state that the Pottawatomie Indians of Michigan and Indiana included in said act of Congress are the descendants and heirs of Pottawatomies once divided into and belonging to seven bands known as the Hurons, Maug-ach-quas, Mick-a-saw-bes, Match-e-be-nash-she-wish, Nottawaseps, Pokagons, and Prairie-Rondes, the latter being sometimes called Saganas band, the whole now numbering 1,622 persons as nearly as can be stated. About the year 1833, the Pottawatomies as a tribe removed west of the Mississippi river, but a number of individual members remained east of Lake Michigan, those remaining east being the Indians designated in the said act of Congress. Those included therein have no tribal organization or chief, and do not exist as a tribal body. They do not live in or hold tribal relations with each other. They are citizens of the United States scattered over Michigan from the straits to its southern boundary, and about 12 besides living in Indiana, earning their own living in various kinds of pursuits severally the same as white citizens. Your petitioners embrace all of the Indians mentioned in said act as far as their names could be ascertained, except not exceeding 250 descended almost entirely from the Pokagon band, 91 of whom are those taking part in the contract aforesaid, but they file this petition on behalf of themselves and all the other Indians included in said act who may choose to come in and share in these proceedings, including the 91 aforesaid.

Your petitioners further state that the treaty stipulations referred to in said act of Congress are those contained in certain treaties made between the United States and said Pottawatomie Indians, August 3, 1795; September 30, 1809; October 2, 1818; August 29, 1821; October 16, 1826; September 20, 1828; July 29, 1829; October 20, 1832; October 26, 1832; October 27, 1832; September 26, 1833, including the article supplementary thereto of September 27, 1833, and June 17, 1846.

That the Indians designated in said act of Congress were either ancestrally or directly parties to all of said treaties and entitled to share *per capita* in the annuities secured to the Pottawatomies thereby, and to severally participate in the benefits arising therefrom to them. In the earlier treaties they are called Pottawatomies, later the United Nation of Pottawatomies, and in the treaty of 1846 it was agreed they should be thereafter known as the Pottawatomie nation. By these several treaties the United States pur-

chased, and the said Indians ceded large tracts of land to the Government, amounting in all to about 30,000,000 acres, the lands aforesaid also granting the reservations held by them separately; and in payment the United States, among other things, agreed to pay them certain annuities, and also with other lands.

* * * * * * *

After deducting the payments of $75,162.50 aforesaid, there remains due the claimants in all the matters aforesaid, $963,058.50, and $804,383.80 of said amount belongs to your petitioners, and they demand judgment for said sum.

JNO. B. SHIPMAN,
Attorney for Petitioners.

Address: Coldwater, Mich.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

Before me, the undersigned, appeared John B. Shipman, attorney for the above petitioners, and made oath that he is the authorized attorney of the Indians named as petitioners in the foregoing petition in the matters above mentioned; that he knows the contents of said petition, and that the matters therein stated are true, so far as the same are stated on his knowledge, and as to the matters therein stated on the knowledge, information, or belief of the petitioners he believes them to be true.

Dated, Washington, November 5, 1900.

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Judgment of the Court.

"The court, on due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said Pottawatomie Indians do have and recover of and from the United States the sum of one hundred and four thousand six hundred and twenty-six dollars."

Mandate of the Supreme Court

"It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this case be, and the same is hereby affirmed."

APPENDIX TO FINDING III.

Instructions of the Commissioner of Indian Affairs to Cadman.

That the inspector designated to take the census proceed to Benton Harbor, Mich., and to South Bend., Ind., the places of abode of the Indians referred to, and to take a careful census of the Pottawatomie Indians of Indiana and Michigan. * * * In taking the census the inspector should be guided by the roll (herewith inclosed) upon

which the payment was based in the *pro rata* distribution of the $39,000 made in accordance with the joint resolution of Congress approved July 28, 1866 (14 Stats., 370).

He should account for all the Indians (230 in number) whose names appear upon the roll referred to and then enroll all of those who can furnish positive proof of being legal descendants of the original 230 Indians. No additions are to be made to the original roll other than the descendants of the Indians whose names appear upon the roll above referred to.

Letter of John B. Shipman.

COLDWATER, MICH., *July* 27, 1895.

To Hon. Hoke Smith, Secretary of the Interior:

In the matter of the Pottawatomie Indians of Michigan and Indiana:

As directed by the Commissioner of Indian Affairs, I got in communication with Mr. Cadman, who is engaged in taking the census of these Indians with a view of making payments of the money appropriated by Congress for them, and finally met him.

It required but a few minutes' examination to discover it was impossible for the department to carry out and comply with the decision and findings of the court allowing the claim upon the line he was pursuing and under the directions he was obeying. He is enumerating and taking a census only of the Indians mentioned and contained in the pay-roll of 1866, and the heirs of those deceased. This is certainly and surely wrong, and as this seems a turning point in the matter and the question is a very important one, I must ask that the findings and opinions rendered by the Court of Claims therein be examined with great care. The findings of fact declaring or showing to whom the money belongs are all in the report, as well as the opinion explanatory of the findings. (See 27 C. Cls. R., p. 405.) In affirming the case the Supreme Court (148 U. S., 691) did not in any way change the finding and opinion of the court below. To aid in the investigation I state the question, how it arose, and how it was decided.

September 26, 1833, a treaty was made at Chicago with the United Nation of Chippewa, Ottawa, and Pottawatomie Indians, which made it obligatory upon the Indians who were parties to it to remove west of the Mississippi river in three years thereafter. The Michigan Indians were all opposed to emigrating west, and refused to join in the treaty which made it obligatory upon them to do so. The Michigan Pottawatomies at that time had three reservations in what was then the Territory of Michigan, one consisting of 49 sections on the St. Joseph river, opposite the town of Niles, occupied by Topenebees and Pokagonns bands, another being the Nottawasepis reservation of 4 miles square, and a third consisting of 99 sections north of it. September 27, 1833, a supplement was added to the treaty made the day previous, in which the Michigan Indians joined and became parties thereto, whereby these three reservations were

ceded to the Government, the last supplemental article, however providing that the portion of the tribe residing on the Michigan reservations might remove to the northern part of Michigan, in which case the "just proportion" of all the annuities payable to them under former treaties and that arising from the sale of those three reservations should be paid them at L'Arbre Croche (near the Straits of Mackinac).

(See the treaty in the U. S. St. L., 442–'5.)

After this, most of the Indians left the reservations, going into different parts of Michigan and many of them into the northern portion of it, but a part of the Pokagon and Nottawasepi bands remained in southern Michigan. No attention was given the Indians by the Government until 1843 (ten years after making the treaty), when small payments of money commenced to be paid them, which was continued yearly up to and including 1866; but the payments were made in the southern part of Michigan to those portions of the Pokagon and Nottawasepi bands remaining there, and not at L'Arbre Croche, as agreed in the treaty. These Indians and those going north numbered, all told, 1,100, as found by finding XI of the Court of Claims in the suit mentioned. To show the number of Indians paid, and the fact of their payment from 1843 to 1866, inclusive, a letter of Hon. E. B. French, of May 4, 1871 (then Second Auditor), was used in evidence and is contained in finding VII, but the only pay-rolls given in evidence were for the years of 1843 and 1844, and these were obtained by me under a call upon the Treasury Department. They are found in the printed evidence of the case at pages 123 to 126 (printed pages), and also in the return made to the court by the Secretary of the Treasury now in the files with the rest of the evidence taken by me in the cause. These two rolls of 1843 and 1844 were the only lists or evidence used in the court showing the names of the Indians who were paid by the Government at any time. No pay-rolls or other evidence showing the names of Indians paid after 1841 was in or can be found in the case.

It will be seen here were two classes of Indians, as stated by the court in finding XI, the one consisting of those to whom the payments in question were made and the other comprising those who went north and elsewhere in the State, and the question presented was, How many of them had a right to remain in Michigan and were therefore entitled to receive a "just proportion" of the annuities mentioned? I insisted that as all had equal rights in the reservations ceded, all should share equally in the avails when sold under the terms of the treaty and supplement thereto; but the court decided against me, holding that only those Indians to whom the payments mentioned were made came within the exemption as to removal west and were therefore the only ones entitled to a "just proportion" of former annuities, etc. (See finding XI.) Finding XIII states these payments were "made to a part of the Pokagon and a portion of the Nottawasepi bands of the Pottawatomie Indians," not to Pokagons alone, while finding XIV further defines

those entitled to the money and identifies and declares those coming within the supplemental articles as to removal to be "those parts of the Pokagons and Nottawasepi band to whom the payments mentioned in the said letter of Hon. E. B. French were made as shown in finding VII," while the pay-rolls mentioned in 1843 and 1844 contain the only information the court had as to whom those Indians were. Observe finding XII, also, which decided these Indians "represented in both petitions." The opinion rendered in the case also emphasizes this fact.

It must also be kept in mind that the matter to be arrived at was the Indians who had a right to remain in Michigan and be paid these annuities in 1833, not in 1866, and the court took as the best evidence of that fact the first pay-roll made after that year, viz, in 1843, the officers and agents of the Government having by the act of paying them recognized those Indians as the ones entitled to stay and be paid. To take one made in 1866, thirty-three years after the right under consideration arose, would manifestly work great injustice, for those having a right to stay up to 1843 or 1844 had a right to remain always and live where they chose in the State, and before 1866 many of them died, while others had moved north, and their names would not appear on the pay-roll of 1866, or other causes might have operated to prevent their names from being there; but their heirs are entitled to share in the fund just the same, and so should they if living. I am also told there are those on the roll of 1866 who have no business there.

Besides, the pay-roll of 1843 contains but 207 Pokagons, the rest to make up the 253 upon it are Nottawasepis, and 1844 the number of the Pokagons is 208; but the total number paid was 269, the balance being Nottawasepis, as noted on the roll, while the total number through all the years, as averaged by the court and upon which its award was based, was 291. To give the fund now all to the Pokagons, as will be the case if the census is based on the 1866 roll wholly, is to pay them money awarded by the court to the Nottawasepis.

I do not mean to say under the broad decision of the court that pay-rolls subsequent to 1844 cannot be considered or acted on, and if names there appear which are not on the rolls of 1843 and 1844 that such Indians (or if dead, their heirs) cannot share in the fund; but I mean and insist that the census should omit no one on the pay-rolls of 1843 and 1844 which were used on the trial in that case, and I respectfully ask that those rolls be sent Mr. Cadman at once and he be directed to include in his census all the Indians, or, if dead, the heirs of all the Indians whose names appear thereon. In no other way can the decision of the court rendering the judgment mentioned or the purpose of Congress in making the appropriation to pay it be carried out fully.

To aid the enumerator, I inclose the names of heirs whom I represent (as far as ascertained to date) and whose ancestors are named on the pay-rolls, as well as those entitled in their own right, the Nottawasepis and Pokagons being in separate lists, the numbers in the margin corresponding with the numbers in the pay-rolls. Where

two numbers appear, it indicates where the name appears on both the pay-rolls of 1843 and 1844. I might, if desired, get their residence also. I have not examined subsequent pay-rolls sufficiently to know whether or not I represent any upon them which are not on these.

I hope to be speedily advised of the course determined upon by the department, so that, if the conclusion is to proceed under the census based upon the roll of 1866, I may have time to seek a remedy before the fund is paid out.

Respectfully submitted by

JOHN B. SHIPMAN.

Decision of Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January* 10, 1896.

Commissioner of Indian Affairs.

SIR: I have considered your communication of 9th instant, acknowledging receipt of department letter of 4th instant and submitting plan of enrollment of Pottawatomie Indians of Michigan and Indiana entitled to participate in the judgments of the courts in their case.

I concur in your opinion that only those should be enrolled who make satisfactory proof of their claim and who can show that they were on one of the rolls taken in the years 1843 to 1866, inclusive, or are descended from some one on one of those rolls.

Very respectfully, HOKE SMITH, *Secretary.*

Instructions to Agent Shelby.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *February* 5, 1896.

Marcus D. Shelby, special Indian agent, Washington, D. C.

SIR: You are hereby directed to proceed to South Bend, Ind.; Chicago, Ill; and Keeler, Bradley, Harbor Springs, Allegan, and such other points in the State of Michigan and elsewhere as in your judgment may be necessary, to examine and report upon the claims of the several parties alleging to be descendants of the Pottowatomie Indians of Indiana and Michigan, who were permitted, by the supplemental clause to the treaty of September 27, 1833, to remain east, and for whom the Court of Claims rendered a decision in their favor for $104,626 June 27, 1892.

Inspector Cadman last June made a census of the Pottawatomies of Indiana and Michigan and used as a basis for enrollment the last pay-roll upon which these Indians were paid in 1866. Since that time many persons have made claims for enrollment, submitting that their parents or ancestors were upon rolls prior to 1866.

The Honorable Secretary of the Interior decided, January 10, 1896, that only those should be enrolled who can make satisfactory

proof of their claim and who can show that they were upon one of the rolls taken in the years 1843 to 1866 or are descended from some one upon one of those rolls.

You will therefore require all persons applying to you for consideration of their claims to submit proof, fully substantiated by two or more reputable witnesses, that they are the direct descendants of some person upon some one of the above-mentioned rolls (copies of which are herewith furnished you), and, if possible, to tell what rolls their ancestors were upon.

If claim is made as a grandchild of some person whose name was upon one or more of the rolls above referred to, it will be necessary to show why his own parents were not enrolled, and whether they did not remove west, in compliance with the stipulations of the treaty of September 27, 1883, and there receive lands and annuities. Collateral descendants will in no instance be considered.

No doubt many Indians will present their claims who are the descendants of those Indians who were not included in the supplemental clause of the treaty and would not remove west and have ever since resided east of the Mississippi. This class have no rights in the money awarded, and a reference to the rolls will soon determine their status.

You will send notices to all points you will visit, to be posted in the post-office, giving timely advice of your arrival and the object of your visit. You will be furnished with these notices, which you will use when going to points not indicated in the instructions.

A copy of the Cadman roll is furnished you herewith for your information and guidance. As this office and the department have decided that all names now on the Cadman roll are entitled to participate in said payment, you will therefore make no additions to or deductions from said roll, as it is only furnished you for reference, as many who are already on said roll will probably apply to you to investigate their cases, and by reference to this roll you may save much time and annoyance.

You are not required to make any roll whatever, but will make report in detail, giving the evidence in each case separately, for the consideration of the office.

Respectfully,

D. M. BROWNING,
Commissioner.

Report of Agent Shelby.

CHICAGO, ILL., *March* 14, 1896.

Hon. Commissioner of Indian Affairs, Washington, D. C.

SIR: Under instructions from your office dated February 5, A. D. 1896 (A, 40 inclosures), directing me to make an investigation of sundry claimants' rights to enrollment upon Pottawatomie roll of Indians falling under the supplementary treaty of September 27, A. D. 1833, I have the honor to submit in detail my report upon each claimant submitted.

In addition to the list of those furnished me by your office, I heard the applications for enrollment of quite a number of other

Indians, who, in my judgment, have no standing in this matter, as they could not show that either themselves or their ancestors were enrolled upon any of the rolls from 1843 to 1866. I took no evidence in such cases, but informed the parties that they have no right to enrollment. I found it no easy task to show these Indians that the fact of their having Pottawatomie blood did not alone entitle them to the participation in the money soon to be distributed, and that it was awarded by the court to those coming under the supplemental treaty of September 27, 1833. They failed to see the justice in one part of the Pottawatomie Indians receiving money from the Government to the exclusion of the others. Very nearly all of these Indians have allied themselves with other bands and tribes of Indians and participated in annuities and the distribution of lands made said Indians. I found these people very badly scattered, and as they do not frequent post-offices, the notices prepared for me to be posted in the various post-offices, to give them notice of my coming, were of but little value. In nearly every instance, on reaching the vicinity of these Indians, I had to take teams and drive to their homes. I got, however, the newspapers to publish the principal points I would visit.

The complainants, Thomas L. Sancomb and Mistress Frances Edwards and Mistress Julia Howard, of South Bend, Indiana, could not show that either themselves or their mother, Mistress St. Comb—or Sancomb—were upon any of rolls from 1843 to 1866, but claim they were enrolled in 1836 with the Pottawatomie Indians and received certain annuities; this, I understand, to be the last payment made these Indians prior to their removal west of the Mississippi river. Their contention is that their failure to be enrolled upon subsequent rolls was because of the failure of Thomas L. Sancomb and his mother to reach the payment in 1843 before it was completed, and want of information as to subsequent payments, caused by the distance they were removed from the other Indians and a want of intercourse between them. They cite the facts that their mother, Mary St. Comb, as it was then written, is mentioned in Schedule A of the supplemental treaty of September 27, 1833, as receiving certain moneys, and contend this is sufficient proof that they were among those who were embraced in the supplemental treaty and should not be charged with their misfortune in not being enrolled from 1843 to 1866. To admit this to be true would in effect set at naught the acts of the agents in enrolling these people in 1843 to 1866, who certainly had a better knowledge as to who came under the supplemental treaty than we can possibly have at this late day. To enroll these people would, in justice to the numerous others mentioned in the various schedules of said treaty as having received money, become necessary to reopen the census roll of these Indians and admit to enrollment the scores of the descendants of the others named in the schedule referred to. It would take months of untold labor and necessitate the enrolling officer visiting nearly all, if not every State of the Union, should these people be entitled to enrollment. See Exhibit A for evidence and list of claimants.

Complainants Charles T. Chandonia and Mistress Fanny M.

Philion, heirs of Charles Chandonia's claim, is analogous to those of the Sancombs. They state that their father, Charles Chandonia, is mentioned in Schedule A of supplemental treaty of September 27, 1833, which fact establishes the right of his descendants to participate in the fund to be distributed, due the supplemental Indians. And further, that they recognize on the roll- of 1843, 1844, and 1845, the name of their father, which is spelled "Way-saw-way-shuck," and the spelling of the name on the roll of 1844 is erroneous in this, that the syllable "sun" in said name should be "saw." In examining the rolls, I find that there are enrolled on the roll of 1843 the name of Way-saw-way-shuck, wife, and four children, making six in the family; on the roll of 1844, Way-saw-way-shick, wife and two children, making four in the family; also on that roll is the name of Way-sun-way-shuck, and wife, making two in the family; on roll of 1845 we find Way-saw-way-shuck, wife, and two children. On the roll- of 1846, 1848, and 1849 the name seems to have merged into Way-saw-waw-shut and Way-saw-way-sut, and on each of these rolls is enrolled wife and two children. On rolls of 1847 Way-saw-waw-shut, wife, and one child appears. After 1849 this name seems to have dropped off the roll. The mother of the Chandonias was a white woman, and not entitled to enrollment. This fact, connected with the discrepancy in the name of the spelling of an educated Indian on the various rolls, and the discrepancy of the enrollment of the numbers of his children, together with his desire not to be known as an Indian on account of his political aspirations, convinces me that the Chandonias are mistaken in the Indian name they assumed to be that of their father's. See Exhibit B, list of family and evidence.

Sarah C. Anderson could not show the name of her ancestor on the roll of 1843 to 1866, in fact could not give her grandmother's Indian name (from whom she claims her Indian blood). Her grandmother was a negress from Virginia, and came to Indiana in 1839, and what Indian blood she had must necessarily have been from some southern Indian.

Mistress S. P. Sikes and Mistress Beulah E. Keith, of Keeler, Mich., sisters, and those they represent as their families, and their connection. Their mother was a Pottawatomie Indian and educated at Carey missionary station in Indiana, and received from the Government, upon graduating, a quarter section of land. She was never enrolled upon any of the rolls of Pottawatomie Indians, or received any annuities from the Government. Her husband was a white man, who broke off all intercourse with herself and her Indian relatives.

Joseph Paul, of Hartford, Mich., is a Miami Indian. Was enrolled on roll of said Indians in June, 1895, which roll was paid off by me the first quarter of 1896. He being in Michigan and not applying for his share on said roll, it was returned to the Treasury.

Mary Mackey, of Athens, Mich., has no claim to enrollment, because of the fact that her father, Mo-asa-qua, went west with the Pottawatomie Indians and drew annuities with them, and afterwards returned to Michigan. They have since been enrolled with what is known in Michigan as the Huron band of Pottawatomie

Indians, and participated in all the moneys of said Indians, and received some seven years ago $350, her share paid said Indians at that time. Her father stated to me that she was not entitled to share with the supplemental Indians.

Sophia Nah-lu-ga-be, of Bellaire, Mich., nor her father, Negosa, from whom she claims to have inherited Pottawatomie blood, can be found on the rolls from 1843 to 1866. She has no knowledge of her father having ever participated in any payment made the Pottawatomie Indians.

C. J. Allore, of Charlevoix, Mich., nor his mother, Elizabeth Allore, appear upon the rolls from 1843 to 1866; his mother having died in 1841 could not necessarily appear upon said rolls. C. J. Allore looks to be a full-blooded Frenchman, but has heard he has Pottawatomie blood in his veins, and having heard that they were soon to be paid money i- reminded him of his Pottawatomie blood, a fact that had been kept quiet from the balance of the community.

The name of Julia Spaulding, of Kingsley, Mich., nor her mother, Tennas Spidel, or her grandmother, Machewaqua, could be found on the rolls from 1843 to 1866. She, too, is entirely ignorant as to any participation on the part of her ancestors in any Pottawatomie payments, but having Pottawatomie blood thinks she should share in the distribution of the Pottawatomie fund.

John Pulcipher, of Acme, Mich., who wrote your office on February 1, 1896, stating there were a number of Indians in that community who were entitled to be enrolled on the roll of Pottawatomie Indians, stated that all of the Indians referred to in said letter were Indians who refused to go west with the main body of the Pottawatomie Indians and who fled to northern Michigan to escape the officers who removed them.

These Indians being here without permission from the Government and contrary to the stipulations of the treaty, I did not feel it my duty to spend any time in interviewing them.

Mary Hennessy, of Montague, Mich., states that her grandfather, A-ne-meke-we, was a Pottawatomie Indian, her grandmother an Ottawa Indian; neither her grandfather or her mother, Wa-we-yes, are on the rolls from 1843 to 1866. She knows nothing of her grandmother having participated in any payment made to the Pottawatomie Indians, but that her ancestors, she has been informed, were allied and shared in the annuities of the Ottawa Indians. The husband of Mary Hennessy states that George Armstrong, her uncle, paid D. K. Foster $1, with the promise that he would have her enrolled on the roll of the Pottawatomie Indians. This, Foster says, is true, and he received the dollar as an attorney fee for his services.

Lewis L. Woodville, of Oregon, Ill., and his uncle, Alex. Beaubien, of Chicago, made no claim that they or their ancestors were upon the rolls from 1843 to 1866. Alex. Beaubien stated that neither he or his ancestors had been enrolled since 1836, at which time they were paid with other Pottawatomie Indians; he thinks they were among those included in the supplemental treaty, but knew nothing of subsequent enrollments and payments after 1836.

The Beaubien family, I understand from them, was given

by the Government large tracts of land in and around the city of Chicago, and were once quite wealthy in consequence of said gift, but it all seems to have vanished. Their wealth, no doubt, and social standing in the community dwarfed, doubtless, their desire at that time for further participation in Indian payments.

I do not understand why I was given the communication of Eliza Mendoky, as she makes no claim to enrollment on the Pottawatomie roll, but complains that her husband, Joseph Mondotey, has deserted, and that there is deposited $110 in S. R. Kirk & Son's bank of Athens, Mich., for her minor child, Angeline Mendokey, and wants the interest paid to her for the support of her said child. I wrote to S. R. Kirk & Son for her and found, as I expected, that S. R. Kirk was the guardian of her daughter, Angeline, and that the money for said minor was paid said guardian by the disbursing officer in making a payment to the Huron band of Pottawatomie Indians some seven years ago. This matter has now passed into the hands of the probate court of Calhoun county, Mich., and I have advised her to apply to the probate court and ask that the guardian be directed to pay to her as the custodian of her said child all sums of this money that should be expended for her support.

The long list of applicants for enrollment forwarded the office by D. K. Foster, of Bradley, Mich., was by D. K. Foster abandoned with one exception when he saw he would have to show that the applicants and their ancestors were upon some one of the rolls from 1843 to 1866. They are all Pottawatomie Indians. But Mr. Foster, as above stated, finding it would be difficult to prove this fact, abandoned this list. But they allied themselves with the Ottawa and Chippewa Indians in 1855 at a treaty made with said Indians at Detroit, Mich., and shared in the annuities and distribution of lands made said Indians in 1855 to 1871, and were never enrolled with any Pottawatomie Indians. Alice Sprague, however, who is named in said list, thought she recognized the name of her grandmother, Oge maw quay, on rolls of 1853, 1854, and 1866, and made affidavit covering that fact and gave a list of the descendants of her supposed grandmother. D. K. Foster and P. Pas she go qua made an affidavit of identity covering the same state of facts as Alice Sprague. Among those mentioned in the affidavit of Alice Sprague as the descendants of her supposed grandmother was Joe H. Cushaway on census-roll of Pottawatomie, and Alex. Chippewa (Lewis), her cousins. When I reached Fern, Mich., the home of Joe H. Cushaway, he made an affidavit that Oge maw quay named as the grandmother of himself and Alice Sprague, in her affidavit, was not their grandmother, but was the mother of Aken on said roll, and further that he is now 47 years of age, and that he never knew his grandmother, whose name was Oge maw quay, she having died some years before he was born. Substantially the same state of facts are sworn to by Angeline Cushaway, wife of Joe H. Cushaway, and Alex. Lewis, who is also a grandson of Oge maw quay. Joe H. Cushaway and his wife, Angeline Cushaway, were raised among the supplemental treaty Indians, and remembered to have attended various payments made to said Indians, and had a better knowledge

of knowing these Indians than Alice Sprague, who has never been enrolled among them, and whose association and enrollment were with the Chippewa and Ottawa Indians. I am clearly of the opinion that these people are not entitled to enrollment. See Exhibits C and D for evidence and list of descendants.

Alex. Lewis, of Mount Pleasant, Mich., is a new applicant. He is the same party named in the affidavit of Alice Sprague under the name of Alex. Chippewa as the grandson of Oge maw quay. He bases his right to enrollment upon the fact that when about 2 years of age he was given by his mother, Pen quay, to his aunt, Ke no maw ne quay; that he was raised by said aunt, and was one of the three children enrolled with said aunt in 1866, Joe H. Cushaway, a nephew, and Stephen Pepeypeyor, a grandson of said aunt, being the other two children.

I learned after taking Alex. Lewis's affidavit that he had a child not mentioned, and wrote to Joe H. Cushaway and requested him to furnish your office with the name and age of said child. The facts above enumerated are sworn to in an affidavit also by J. H. Cushaway and his wife, Angeline Cushaway.

I was informed by Joe H. Cushaway that Angeline Pokagen, wife of Charles L. Pokagen, on census-roll was the daughter of Pe wa se quay, roll of 1856, No. 12, and that said Angeline Pokagen is his sister, and that said Angeline Pokagen was the child enrolled with his said mother in 1856, and should be enrolled with her said husband on the census-roll of the Pottawatomie Indians. Joe H. Cushaway discovered the above fact just after I had completed my work at his house, which was then at 10 o'clock at night and snowing, and I had yet 12 miles to drive through the snow back to the railroad in order to get a place to lodge for the night; so I did not take his affidavit to the above statement of facts, to which he would have sworn. He further states that his sister, Angeline Pokagen, had by a former marriage a daughter, Eliza Aiken, aged 17 years, now living at Newaygo City, Mich.

John J. Peashaway, residing at South Bend, Ind., and grandson of John Peashaway, Pottawatomie Indian, states that he believes that the name of Peasaway, as it is spelled on the roll of 1843, 1844, and 1848 and 1859, is his grandfather, and that his said grandfather had three children, viz., Henry Peashaway, his father, who is supposed to be dead; Lizzie Peashaway, now the wife of Lawrence Mix, and Julia Alexas, wife of Davis Alexas, who is enrolled on census-roll. The mother of the Peashaways is not claimed to be a Pottawatomie woman, but reference to the roll will show that Peashaway, as it is spelled on this roll, had enrolled with him in 1843 wife and three children; in 1844 and 1848, wife and six children; in 1859, wife and four children. The name of Peashaway seems to have dropped off the roll in 1848 until 1859, when it is again dropped from the roll and does not reappear. Simon Pokagon states in his affidavit that John Peashaway never was enrolled and drew with said Indians because the agent knew that he was not one of those who came under the supplemental clause and would not permit him to be enrolled, but that Peashaway attended the

payment in 1843 and subsequent payments, and that he does not believe the name of Peashaway on the rolls mentioned is the grandfather of John J. Peashaway and others named in his affidavit, and that he did not know any other Peashaways belonging to the Pottawatomie Indians. Elizabeth Mix states in her affidavit that she has no knowledge of her father being enrolled on roll of Pottawatomie Indians, but remembers when a child hearing him speak of Indian payments and drawing annuities; that she believes that the name of Peashaway upon the various rolls and as it spelled is her father. The discrepancy in the spelling of the Peashaway name and the excess in number of his family over and above those given by John J. Peashaway, together with his name being off and on the roll, as already stated, leaves doubt in my mind as to the right of these parties to enrollment, and creates the belief that they are mistaken in the name of the Peashaways on said roll being their father. Should they be held to strict proof, they certainly have no rights. See Exhibit D for evidence and list of claims.

Andrew J. Blackbird, of Harbor Springs, Michigan, states that he believes that the name of Seebeequay on roll of Pottawatomie Indians in 1844, No. 6, is his grandmother; that his grandfather and grandmother were Pottawatomie Indians, and that his said grandmother remained with the Pottawatomie Indians until 1845, when she moved to northern Michigan and died during that year; that all of the descendants of his said grandmother lived in northern Michigan and intermarried with the Ottawa Indians and were enrolled with said Indians in 1836, and participated in the treaty of 1855 with said Indians and the United States Government, and shared in the annuities and lands awarded said Indians under both of said treaties until the year 1871, when their last treaty expired. You will observe that he does not state positively that Seebeequay is his grandmother enrolled in 1844, nor has he any knowledge that she drew money with the supplemental Indians in 1844, nor does he know that there was not another Pottawatomie Indian by the name of Seebeequay. You will also observe that he is now 80 years of age and has always lived among the Ottawas. He stated to me, which does not appear in his affidavit, that he never lived among the Pottawatomie Indians or knew anything about them. It might be well to state it is only necessary to show these people a name upon the roll that is similar, or is the name by which their ancestors are known, for them to jump at the conclusion that it is the name of their ancestor, and are ready to make the necessary affidavit and proof without knowing whether he or she actually drew money at the time or date stated in said roll, or that there was not another member of the tribe of the same name of their ancestor. He had no one within reach by whom he could prove his identity, and I left him with the necessary affidavit to have accomplished and forwarded to your office. The bare fact that the direct ancestors of these people were Ottawa Indians and enrolled with said Indians and participated in their annuities from 1836 to 1871 should bar them from participating in the payment soon to be made, to say nothing of his total

want of proof that Seebeequay on the roll of 1844 is his grandmother and his inability to identify her as having drawn money at that time. See Exhibit E for evidence and list of family.

I took the affidavit of S. M. Ski ppr qush, who thought the name of Way see bah was his grandmother, but afterward upon examining the case I saw that he had wholly failed to make a case, and will not burden this report with a long history of the Ski ppr goshes.

While my instructions were not to interfere with census-rolls, I found the Indians were violently opposed to the enrollment of the Cowles heirs on said roll, and Simon Pokagen and Elizabeth Mix asked to be permitted to enter a protest to their enrollment. And from their affidavit you will see that Edward Cowles Kawkawkawshe, as he was enrolled, was not a Pottawatomie Indian, but was a half-breed Chippewa Indian. About the year 1857 Edward Cowles was admitted to the roll of said Indians because of his education and means, with the understanding that he should be enrolled with said Indians and share in their annuities, and that such share as he drew should go as a compensation for his services in prosecuting the claim so to be distributed before the Government. I was told this by a number of other Indians, who have had correspondence with C. C. Cowles, son of Edward Cowles, now living at Council Bluffs, Iowa, which letters will be marked as an exhibit, that convinces me that the statement of Pokagen and others is true. C. C. Cowles was to have met me here, but has so far failed.

In my judgment, none of these Indians have any right to enrollment on the roll of Pottawatomie Indians coming under the supplemental treaty of September 27, 1833, for the reason that all, with possibly two exceptions, have failed to make positive proof. They themselves or their witnesses could not state positively that their supposed ancestors were ever enrolled with said Indians, or that they drew money on the roll upon which they were found, or that there was not another Pottawatomie Indian by the same name. Alex. Lewis furnishes the same evidence as that which admitted Joe H. Cushaway to enrollment, and think he should be enrolled, and do not think an error would be made if Angeline Pokagon, wife of Charles L. Pokagon, and child were enrolled, who were mentioned on census-roll by Inspector Cadman as not being found on roll of 1866.

Respectfully,

(Signed) M. D. SHELBY,
Sp'l Indian Agt.

Filed May 20, 1901.

[Endorsed:] File No. 18351. Supreme Court U. S. October term, 1901. Term No. 498. Phineas Pam-to-Pee and others, app'ts, *vs.* The United States. Stipulation and addition to record. Filed Jan'y 17, 1902.

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Office Supreme Court U. S.
FILED
FEB 3 1902
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

PHINEAS PAM-TO-PEE ET AL.,
APPELLANTS.
v.
THE UNITED STATES.

No. 211

Now come the appellants in this cause and move the court to advance the same and fix an early day in March to hear it, for the following reasons:

STATEMENT.

By an act of Congress approved March 19, 1890, the Court of Claims was given jurisdiction to try and determine the claims of certain Indians to unpaid annuities under various treaties with the Pottawatomie tribe (26 St. 24) under which suits were prosecuted, resulting in a judgment by said court in favor of the Indians for the annuities then due, and establishing those to grow due (27 Ct. Cl. 403. Affirmed, 148 U. S. 691.) Congress appropriated money to pay the judgment and also the perpetual annuities, these being capitalized, directing the Commissioner of Indian Affairs to disburse the fund among the Indians entitled. The claimants in the case at bar, numbering 272, were also claimants in the suit wherein said judgment was rendered, and entitled to share with the other Indians in the distri-

bution of said fund appropriated to pay it, but none of it was paid to them. Hence this suit, which in reality is but a proceeding to carry said judgment into effect. The act mentioned, of March 19, 1890, provided: "And the said courts shall give such cause precedence." The present suit comes within the spirit if not within the letter of that provision, while the need of speeding the litigation is greater now than when the Indians were younger. Therefore a favorable consideration of the motion is respectfully urged.

JNO. B. SHIPMAN.
Atty. for Appellants.

24022

No. 211.

Brf. of Shipman for Appts

Filed Oct. 6, 1902.

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Supreme Court of the United States

OCTOBER TERM, 1901.

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PHINEAS PAM-TO-PEE AND OTHERS, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

JOHN B. SHIPMAN, Attorney for Appellants.

Coldwater Sun Print, Coldwater, Mich.

24024

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(NOTE: The record, although bound together, contains two parts paged not continuously but each separately. The first will be referred to as the Record and the second part as the Appendix, in this brief.)

STATEMENT.

The action is upon a judgment rendered by the Court of Claims against the defendant and in favor of the appellants and other Indians, and for the money appropriated by Congress to pay it and the annuities thereby established, but no part of which has ever been paid them.

The judgment is for unpaid annuities due and the perpetual annuities to grow due the claimants therein,

under treaties between the Pottawatomie Indians and the United States and in which they were entitled to share. It is found in 27 Ct. Cl. reports 403 and the facts stated in the findings of fact and in the opinion of the Court as there reported, are a part of the facts found in this case—Rec. 10. The amount of the judgment is $104,626 and to pay it and their proportion and share of the perpetual annuities established by the judgment—the latter being finally capitalized and paid in full—Congress appropriated these sums: $104,626, 28 St. 470—$6,243.90, 28 St. 295—$2,081.30, 28 St. 885—$43,707.30. 29 St. 330—the total appropriations amounting to $156,658.50. The Commissioner of Indian Affairs was charged with the duty of distributing the money among the Indians recovering the judgment and by 28 St. 894 the Secretary of the Interior was directed to take a census of the Indians entitled to the funds and to make payments of the same, an additional $1,000 being appropriated for that purpose. The Court did not determine who the individual Indians were that were entitled to the annuities mentioned, holding that was not contemplated by the act giving it jurisdiction, but designated those in whose favor the judgment was rendered as those Indians remaining in Michigan under the treaty of September 26 and 27, 1833, to whom yearly payments were made in southern Michigan of a portion of said annuities from 1843 to 1866 both inclusive, (and their descendants). This compelled a resort to the payrolls of those years for their names. The appellants in this cause number 272 all of whom are direct de-

scendants of Indians on those pay-rolls and are Indians in whose favor said judgment was rendered and entitled to share in all the appropriations mentioned equally with all others entitled thereto Their names are on pages 4 and 5 of the Appendix (Finding IV, Rec. 9). The total number of the Indians entitled to the funds mentioned is 544—(Rec. 11). The claimants share of the fund is $78,329.25 aside from interest and as no part of it has been paid them and there is no dispute about the facts stated, it would seem the balance of the record consisting merely of alleged excuses by the defendant for not paying them, was legally immaterial. But as the decision below was made to turn upon them these will be reviewed.

The Indian Office detailed Cadman to take the census mentioned. He was furnished only with the roll of 1866 and directed to account for all the 230 Indians upon it and their descendants if dead and admonished that "*no additions are to be made to the original roll other than the descendants of the Indians whose names appear upon the roll above referred to.*" Appendix 10 and 11—Note: In the original case the Court found the number entitled was 291 in 1833.

The Attorney for the Claimants as directed by the Commissioner saw Cadman and then found out the order mentioned under which he was working, and thereupon July 27, 1895 and before his census was completed protested to the Department against the injustice of a census based only on the roll of 1866 insisting it should omit none on the prior rolls including the rolls of 1843 and 1844 and to that end that those

rolls be sent Cadman at once with directions to include all on those rolls and their heirs if dead in his census, *inclosing in the letter a list containing the names of over 150 of the claimants herein, the names of their ancestors and number on the pay-rolls of 1843 and 1844 being given in the letter* also advising them there were others and requesting that he be advised of the course determined on so that if necessary a remedy might be sought before the fund was paid out—Rec. 90 Appendix 11. But no change was made in Cadman's orders and he completed his census under the erroneous order mentioned basing it wholly on the roll of 1866, and it was filed in the Department August 1895—Rec. 8 and 9.

Nothing further appears to have been done in the matter until Jany. 10, 1896, when the Secretary directed the Commissioner to include all Indians on the rolls from 1843 to 1866 in the census, or who were descended from anyone on those rolls, in effect as insisted by the Claimants Attorney in his letter of July 27, 1895.

February 5, 1896 Shelby was detailed by the Indian Office with written instructions quite different from Cadman's. He was directed to examine and report upon the claims of certain parties claiming a right to share in the judgment mentioned; advised of the Secretary's decision as to who should be enrolled, and then came the following directions:

"You will therefore require all persons *applying to you* for consideration of their claims, to submit proof *fully substantiated by two or more reputable witnesses* that they are the direct descendants of some person upon some one of the above mentioned rolls * * * and

if possible *to tell what rolls their ancestors were upon.* If claim is made as a grandchild of some person whose name was upon one or more of the rolls above referred to *it will be necessary to show why his own parents were not enrolled* and whether they did not remove west in compliance with the stipulations of the treaty of September 27, 1833 and there receive lands and annuities * * * As this office and the department have decided that all names now on the Cadman roll are entitled to participate in said payment you will therefore make no additions to or deductions from said roll * * * *You are not required to make any roll whatever* but will make report in detail giving the evidence in each case separately for the consideration of the office"—Appendix 14 and 15.

But Shelby also had ideas of his own as to how to obey and yet defeat the Secretary's order of Jany. 10, 1896 in emergencies not fully covered by his instructions, which can be gathered from his report to the Commissioner of what he did and what he did not do with those applying for enrollment none others being considered. It is dated March 14, 1896 and states:

"Under instructions from your office dated February 5, 1896 directing me *to make an investigation of Sundry Claimants* to enrollment upon Pottowatomie roll of Indians falling under the supplementary treaty of September 27, 1833, I have the honor to submit in detail my report *upon each claimant submitted. In addition to the list of those furnished me by your office,* I heard the application for enrollment of quite a number of other Indians who in my judgment have no standing in this matter *as they could not show* that either themselves or their ancestors were enrolled upon any of the rolls from 1843 to 1866. I took no evidence in such cases but informed the parties that they have no right to enrollment"—Appendix 15 and 16.

Then follows the names of those he investigated

and an examination of them shows that the list of over 150 of the claimants in this cause which was sent to the Indian office July 27, 1895, with the name of their ancestors and number on the pay-roll of 1843 and 1844, was not furnished him. Two claimants however seem to have made an attempt to get on the roll but he ruled against one straightway and the other abandoned the idea when informed of what Shelby required him to prove as a pre-requisite to his case being considered at all. But both of these are in the list of those whom the Court below found were entitled to share in said fund. In summing up Shelby says:

"In my judgment none of these Indians have any right to enrollment * * * for the reason that all with possibly two exceptions, have failed to make positive proof. *They themselves or their witnesses could not state positively that their supposed ancestor was ever enrolled with said Indians, or that they drew money on the roll upon which they were found, or that there was not another Pottowatomie Indian by the same name.*"

He however found two on the roll of 1866 who had escaped Cadman which he advised be added to Cadman's roll and it was done and later the Department discovered and added another.—Appendix 22. Rec. 9.

It was to the Indians upon this roll so made by Cadman with the three names added by the Department that $118,554.52 of the funds appropriated by Congress as mentioned, was paid out not a cent of it being paid these claimants. But what became of the balance of the $156,658.50 appropriated the record does not show.

It does not appear that any attention was paid to the request in the letter of the Claimants' Attorney of July 27, 1895, to be advised of the course determined on by the Department to the end that if the conclusion was to proceed under a census based upon the roll of 1866 (who made it being immaterial) the Claimants might have time to seek a remedy before the fund was paid out—or that he ever saw Shelby or knew of the difference between his orders and Cadman's in taking the census or had any reason to know of it—or that he had any information as to what the Indian Office was doing or proposed to do—except as he obtatned it by finding Cadman in the field as stated. Had the Department given him any such information the defendant's call upon it for "papers and information relative" to the claim would have developed it. And there is no pretence but that the sum of $78,329.25 outside of interest is still unpaid the Claimants upon the various treaties sued on extending as far back as 1795 made by the United States with their Ancestors. The Court of Claims dismissed the petition and the claimants appealed.

ASSIGNMENT OF ERROR.

That the Court below erred in not rendering a judgment in favor of the claimants for their share of the funds mentioned.

JURISDICTION.

The jurisdiction of the court is well settled upon two grounds. First—The Court of Claims has jurisdiction of a claim based upon the unpaid balance of a judgment.

United States v. O'Grady's Exrs. 22 Wall. 641 (22:772).

Hobbs v. U. S. 19 Ct. Cl. 220, 229.
Brown's Case 6 Ct. Cl. 171.

Second—Under the specific appropriations made by Congress mentioned a means of satisfying the claim was provided. The claim is therefore also founded upon a law of Congress within the meaning of Rev. St. Sec. 1059 and is one of which the Court of Claims has jurisdiction.

United States v. Weld 127 U. S. 51 (32:62).
HuKill's Case 16 Ct. Cl. 562.
Hoffman's Case 17 Ct. Cl. 55.
Mordicai Case 19 Ct. Cl. 11.
Wray Case 19 Ct. Cl. 154.
Jordon's Case 19 Ct. Cl 108.
George's Case 18 Ct. Cl. 432.
Blount's Case 21 Ct. Cl. 274.

ARGUMENT.

Having jurisdiction of the subject matter and the claim itself being conceded what defence to the suit short of payment, which is not pretended, is possible?

The decision of the Court below upon the legal rights and duties springing from the relation of debtor and creditor occupied by the parties in this case, is without judicial support.

No principle of law exists which will protect a debtor, who pays his creditor's money to the wrong man, against the claim of the party to whom the fund belonged, for a debtor is bound to know his creditor and to find and pay him before his obligation will be cancelled. Nor is the creditor by any known rule of law, required to follow up the debtor to prevent his paying the wrong man, in order to be safe. Nothing but payment to the creditor destroys a debt, or ends

the debtor's duty and liability to a suit for it. In Jones v. Ricketts 7 Md. 108,117 the Court say it is the *duty of a debtor* to seek his creditor for the purpose of paying him and refused to allow a journey, although a long one, to figure as a consideration in an alleged settlement of the claim sued on. And in Startup v. Macdonald 6 Man. and G. 593 the Court holds the creditor must find the debtor at his peril "if he be within the four seas." If no place of payment is fixed in the contract then payment must be made where the creditor is, but in this instance the annuities by the express provision of the treaty, were payable in Michigan. Ignorance of where the creditor can be found, does not excuse the debtor from the performance of this duty. He must seek and find him "if within the dominion." And an actual tender of the amount due by the debtor and refusal by the creditor to accept it only affects the question of interest and costs afterwards but does not defeat a suit for the debt. Nothing will do that but actual payment of the money by the debtor to and an acceptance of it by the creditor. All this is text book law. It is the law "for the intelligent" everywhere. See 1 Beach on Contracts Sec. 329 and cases there cited. But the Court below seem to have acted upon a theory the reverse of this. In other words that it is the duty of the creditor, to seek and compel the debtor to pay, a rule which would reverse every decision allowing interest against a debtor for non-payment of his debt.

No plea of ignorance or of being misled as to the claimants' right in the fund to base an estoppel on, can

avail, for, aside from the fact that the Department had actual notice of it, the defendant was an active participant in the litigation in the Court of Claims and in the Supreme Court where their right was contested and decided and knew all about it.

The exact point upon which the decision below turned lies in the following excerpt copied from its opinion:

"In this case the claimants knew, or could have known, that the census made by an agent of the Interior Department (Cadman) was returned and filed in August 1895 and that the final decision of the Secretary of the Interior was made in January 1896. So far the case seems clear. The resulting question is, were the claimants bound to ascertain between that time and the payment of the fund during the month of November 1896 that their names were on the pay-roll, or might they assume that the direction of the Secretary would be correctly carried out by his subordinates? The Court has reluctantly come to the conclusion that the burden rested upon the claimants. The documentary proceedings in the Interior Department were not completed when the order of the secretary was made. His decision was his direction that a new pay-roll be made, and the circumstances required vigilance on the part of persons whose right to be there had not yet been determined by name to see that their names were duly placed upon the final pay-roll."

This conclusion as to what the claimants must have done to retain what belonged to them under the treaties mentioned, required them to assume and to act upon the presumption, that the Secretary and his subordinates would not do their duty and put their names on the pay-roll, and while their acts since have demonstrated the wisdom of such a presumption in this in-

stance Courts have not yet gone so far as to require parties to act upon such a presumption or punish them with forfeiture of rights if they do not. It is to be presumed that Government officers will always do their duty whether they do it or not say the Courts.

United States v. Crussell 81 U. S. 821.

United States v. Pugh 9 Otto 265.

In this case they were paid $1,000 for doing it also.

The opinion fails to point out how the claimants could get their names placed upon the roll if they discovered they were not there, while an earlier part of the opinion seems to admit they were powerless to compel this to be done.

It must also be remembered that the Indian office had the names of over 150 of the claimants with the names of their ancestors and number on the pay-rolls of 1843 and 1844 which were sent it July 27, 1895, and before any roll had been completed, whereof enrollment was refused, no attention whatever being given them and the accompanying request that those rolls be sent Cadman at once "and he be directed to include in his census all the Indians or if dead the heirs of all Indians whose names appear thereon" (Appendix 13) was also ignored by the Department as well as the request for information in regard to the course decided on. Instead, Cadman's roll was finished under the roll of 1866 and returned to the office and filed in August 1895 not one of these claimants names being upon it, while the instructions to Shelby charged him that this roll was unchangeable. In effect the 150 claimants (and over) upon said list were denied any hearing whatever.

Notwithstanding this, two of the claimants on their

own motion attempted to have Shelby put their names on the roll but he declined. Appendix 17 and 19. Now what is to be done with this 150 (and perhaps two more) who complied with the letter and spirit of the "burden" cast upon the claimants by the Court below? They are under the same ban placed upon the other claimants who were unprepared to meet with proof this extraordinary issue of fact raised by the Court which no lawyer could anticipate before the opinion was promulgated. Even under the opinion rendered this 150 or 152 were entitled to recover their share of the fund.

The Court was also wrong in assuming that the claimants knew or might have ascertained as a matter of fact whether their names were on the roll filed by Cadman in August 1895 as well as the decision of the secretary made in 1896 before the payment of the fund in November 1896. The Department do not give out such information. The claimants, not one of them, were recognized as having any right in the fund and their Attorney shared their fate and their ignorance. By getting a direction to see Cadman he succeeded in ascertaining what the Commissioner could have informed him of if so inclined and he then promptly protested to the Secretary against the contemplated wrong. But the protest was vain so far as it concerned Cadman's work. His census based wholly on the roll of 1866 was returned filed and verified and by the Department declared to be changeless forever. The request to be informed of the conclusion upon the question submitted was ignored and the list of claimants

sent, and which are found by the Court to be entitled to share in the fund, was turned down and even denied a hearing. The decision of January 10, 1896, by the Secretary and also the order falsely claiming to be made under it, to Shelby, were also official secrets not to be disclosed except under a direction from the Department. These are the rules and practice of the Department and the Court below had no right to assume otherwise or act upon any other theory.

But the proposition upon which the Court below turned the case is bad as a whole, as, in principle has been more than once decided by this Court. To entitle the Claimants to recover it was not necessary for them to follow up Shelby and importune him to place their names upon the final pay-roll even were it not apparent that their efforts (judging by the fruitless attempts made) would have availed nothing, nor to have applied to the Indian Office for a like purpose as over 150 of them did without success. A rule of the Court of Claims once existed requiring claims to be presented to the proper department for payment before suit brought upon them, and in Clyde's Case (5 Ct. Cl. 134, 140) that court in passing upon one of the claims involved uses this language: "It appears by the return of the Quartermaster General that no account of the claim is to be found in his department and it does not appear by any testimony of the claimant that the claim has been submitted to any department." Thereupon it found against the claim.

The case coming here on appeal however this Court decided the rule was void holding in substance

that the fact that the claim had never been presented to any department for payment and had never been allowed or rejected by any officer of the Government was immaterial and in no way affected the claimants right to sue and recover upon it.

United States v. Clyde 80 U. S. 38 (20:479).

United States v. Kaufman 96 U. S. 571 (24:792) also practically decides that a claimant may sue at once in the Court of Claims and without first presenting the claim to any department for payment. See also *Campbell v. United States* 17 Otto 407 (27:592).

In *United States v. Knox* 128 U. S. 230 (32:465) the point was distinctly made Miller Justice stating it as follows: "The second objection made by counsel for the United States is that the claim should have been presented at the Treasury Department and have been disallowed by the accounting officer;" but the Court decided against this contention holding this was unnecessary citing with approval United States v. Clyde in support of its ruling. It was also urged that the claimant should have resorted to a mandamus to compel payment before bringing suit upon the claim, but the Court decided against this contention also. This decision is cited with approval on the first proposition (the second not being involved) in *United States v. Ewing* 140 U. S. 144 (35:389) and in *United States v. Fletcher* 147 U. S. 667 (37:322).

These cases seem to be decisive of and against the proposition upon which the Court below turned this case and disallowed the claim. Besides, there is no rule of law or of morals that can excuse much less

justify the payment of the Claimant's share of the fund in question to any persons but them, after the defendant had notice of their right to it as the opinion concedes was the fact, whatever the claimants did or did not do towards having their names placed on the pay-roll.

The opinion also says "the Counsel for the defendants has taken the broad ground that the Government cannot be made to pay a second time" and produced authorities to sustain the position which however the opinion admits did not meet the present case. Clearly they could not for here the question is whether the defendants can escape paying once.

The authorities referred to, stated generally, are cases where a fund, usually but not always a trust fund, existed in which different parties claimed interests but disagreed as to their respective rights in it, or where all interested in it were not known, and to settle all questions about it the Chancery Court is appealed to. All asserting or who can assert an interest, are brought in by personal or constructive process and given a trial and hearing, terminating with a decree declaring the rights and equities of all interested. Upon payment of the fund as directed by the decree the custodian was protected usually from further litigation about it.

In the case at bar our contention is that the defendant should have followed these precedents and filed a bill of interpleader, or other proper Chancery bill, to determine who the funds mentioned belonged to, under the circumstances existing, to entitle it to

protection in paying them out; the claimants, as well as those to whom the $118,554.52 was paid, being citizens of the United States residing in Michigan and could have been reached through the Courts in that State but through which the Claimants could not reach or control the defendant. No one has yet told who got the balance of the fund not paid out amounting to $38,103.98 however.

The right of the Claimants to recover upon the conceded facts in this case, is so well settled by the Courts, it would seem serious contention upon the question was impossible. The cases are so uniform and numerous that the text books only will be referred to, the cases being cited in the toot notes.—2 Perry on Trusts Sec. 926 states the law thus:

"*Trustees, and all other persons having money in their hands to distribute and pay over to other persons, must see that the money reaches the hands of the persons entitled to receive it: for if they make any mistake in the person to whom they pay the money they are still liable to pay it to the proper person.*" Sections 927 and 928 state how they can protect themselves in cases of doubt as to whom it belongs, sustaining the claimants contention in this regard.

2 Beach on Trusts Sec. 523 and 524 are to the same effect even going so far as to hold if the custodian is induced to make the payment by fraud or deception it will be no defence to a suit for it by the one entitled. Good faith is no defence to the action In case of doubt who to pay, he should apply to the Court to settle the matter and if he does not "he is

without apology in making payment to the wrong person."

1 Lewin on Trusts 344 (Sec. 6) is the same adding however "where there is a mere shadow of doubt as to the rights of the parties" he should apply to the Court.

Underhill on Trusts pages 486 to 488 states the same rule.

OTHER CONSIDERATIONS.

While all legal objections to the claimants' recovery raised by the Court below or that can be anticipated here seem to be sufficiently answered and disposed of, there still remains matters to which attention should be called. In the original suit (27 Ct. Cl. 403) a stenuous effort was made to shut these claimants out of the case to the end that the others might have all the unpaid annuities sued for, as appears by the opinion rendered therein. The attempt was a failure. In the Indian Office it was a success How was this unjust result brought about?

Cadman in taking the census was ordered to account for all Indians on the roll of 1866 and their heirs if dead, but to add none others. He was hampered by no special rules of evidence in doing this, but he was confined to the roll of 1866—(Appendix 11). Discovering this the claimants' attorney protested against the injustice in a letter to the Secretary of the Interior July 27, 1895, asking that the rolls of 1843 and 1844 be included in his work—Appendix 11-14. No attention was paid to this, Cadman being allowed

to proceed under the roll of 1866, and then in August his erroneous roll containing none of the claimants' names was filed and approved by the Department.

But January 10, 1896, came an order by the Secretary that all of the rolls from 1843 to 1866 be included in the census. Then Shelby is sent into the field in place of Cadman, but with instructions widely different and under which no one could have done right by any Indian claiming through rolls prior to 1866. If the purpose was to have a census taken of those on the prior rolls, his orders would have been like Cadman's simply to "account for all the Indians who names appear upon the rolls" from 1843 and 1866 and if dead their heirs. But this was not done. Instead, Shelby was ordered "to examine and report upon the claims of the several parties" whose names were then furnished him, the claimants not being among the number.

His instructions also cast upon the Indian the burden of proving what roll his ancestor's name was on when the Indian had never seen any of the rolls, and also to establish it by an amount of evidence not required in taking the Cadman census nor ever required to establish a civil right in this country. It must also be kept in mind that none of the rolls were accessible to the Indians under the rules of the Department, and yet an Indian asserting a claim to be considered at all by Shelby, was required to "fully substantiate" by two or more witnesses that his ancestor's name was upon them, which was requiring an impossibility of

him as a pre-requisite to a consideration of his claim at all.

Shelby was not directed to find the Indians or the descendants of any Indians on the rolls from 1843 to 1866. Why not, if it was ever intended to include them in the census as required by the secretary's order?

His report shows he followed the instructions to the letter, only varying them to add worse features. He names two of the claimants in it only and of course ruled them out although the Court below finds they were entitled to share in the fund and therefore ought to have been enrolled. One of his new rules added to the instructions as appears by his report is that the applicant in addition to the other impossible requirements, must establish "that there was not another Pottawatomie Indian of the same name." This last idea is Shelby's own. It would effectually prevent any Indian from getting upon the roll through a gap left in his instructions. To call such a report a "census" is a misnomer. The findings of fact in this cause show he omitted 272 Indians who were entitled to be placed on the final pay-roll. Over 150 (and perhaps two more) of them tried and failed to get there. It is manifest that had the others made a similar attempt the result would have been the same. There is not an attribute about it that entitles Shelby's mission and work to the favorable consideration of any Court.

The proceeding was adopted ostensibly to carry out the Secretary's order of January 10, 1896, but its effect necessarily was to defeat it and shut out these

claimants from participating in the fund to be distributed and preserve it all for those on the roll of 1866 the same as was attempted on the trial of the original case. It looks very much as if its success was not owing to the mere blunders of officers, however, but was brought about by an intelligence behind and directing their actions. But whether the wrong was intentional or not, the claimants should not be made to suffer by it.

It is idle to talk of proving the right of any person to have his name placed on the roll before Shelby or the Indian office. Neither were vested with judicial powers. The Act of Congress "directed" the Department to "take a census" of the Indians entitled to the fund in question and pay them, appropriating $1000 for the purpose (28 St. 894). That means an enumeration of the Indians on the rolls from 1843 to 1866 and their descendants entitled to the money, as decided by the Court. The rolls are a verity, being made so by the findings and judgment of the Court. No Indian agent had or could be invested with authority to drop or leave off one Indian upon any of the rolls whatever the cause might be, as Shelby assumed to do. United States v. O'Grady's Exr's 22 Wall, 641. The duty devolved upon the Indian office and upon Shelby was purely ministerial and in no sense judicial or that of an arbitrator. The claimants' right had already been judicially determined and final judgment rendered thereon by the Court, leaving nothing to be done but to pay them the moneys appropriated for that purpose.

SOME IDEAS THE SITUATION SUGGESTS.

Under the Act of Congress [28 St. 894] it was the duty of the defendant to take a census of the Indians entitled to the funds before paying out any of it to them and it cannot shirk this duty or throw any part of its performance over upon the claimants.

The defendant cannot require the claimants to watch it or its agents to see whether or not this duty was performed to entitle them to recover their share of the money.

The defendant had no right to require the claimants to perform any part of the work in taking the census it was its duty to make and the $1000 was appropriated to pay for.

The fact that the census included only half of the Indians entitled to the fund in question is conclusive evidence it was worthless and that it should not have been made the basis of any action by the Department.

The fact that the census contained the names of only 272 Indians when there was 291 of them in 1833 [Rec. 10 and 11] was sufficient to put the defendant upon inquiry as to how this could be and to require it to stop and not use it as a basis of payment until the truth was ascertained.

The defendant cannot be excused from paying the claimants because they did not compel the defendant or its agents to place their names upon the census or pay-roll.

The fact that the claimants did not compel or

cause the defendant to place their names on the pay-roll does not relieve the defendant of its duty to do so.

The fact that the claimants did not "see that their names were duly placed upon the final pay-roll" [the Act of Congress requiring the defendant to do this] does not bar their right to be paid the money promised by the treaties and fixed by the adjudication of the Courts thereon.

The defendant cannot charge the claimants with the consequences of its own non-performance of duty.

The burden of getting the claimants' names upon the final pay-roll did not rest upon them but upon the defendant.

Neither by the treaties, the judgment rendered thereon, nor by any law of Congress, regulation of the Department, or law of the land, were the claimants required "to see that their names were duly placed upon the final pay-roll" to entitle them to their share of the funds in question.

The claimants were not bound to show what efforts were made by or in their behalf to get "their names duly placed upon the final pay-roll" or their failure to receive recognition at the Department, to entitle them to recover their rights in a court of justice. No such burden rests upon them.

The defendant having notice that more than 150 Indians entitled to share in the funds existed, whose names were not "duly placed upon the final pay-roll," all moneys disbursed thereon were paid in the defend-

ant's own wrong, and the act cannot be made to ennure to its benefit in this suit or be used to defeat the claimants' recovery.

The right of the claimants to the money promised by the treaties and adjudged by the Courts cannot be made to depend upon their names being on a census or pay-roll made by a Department employe.

The treaty of September 26 and 27, 1833, made it the duty of the United States to pay this money to the Indians in Michigan [7 St. 442-5]. The law of the land governing the relation of debtor and creditor required it. The Act of Congress mentioned [28 St. 894] commanded it.

And the claimants insist that the defendant be not discharged of this liability short of performance of that duty.

The facts being all conceded, the claimants respectfully ask this Court to render such a judgment in the case as the Court below ought to have rendered. The total amount of the fund is $156,658.50. The total number of the Indians entitled to it is 544 [Rec. 11]. The total number of the claimants is 272, their names being in Schedule A on pages 4 and 5 of the Appendix [Finding IV Rec. 9 and 10]. The total sum belonging to the claimants of the fund mentioned is $78,329.25 whereof each claimant is entitled to $287.97 aside from interest. But it is insisted that interest be allowed if not from the date of the judgment, at least from the time the other Indians were paid in November, 1896, as damages for the unjust

detention of the money. If allowed this will increase each claimant's share proportionately. They ask a several judgment.

JNO. B. SHIPMAN,

Att'y for Appellants.

Office Supreme Court
FILED
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No. 211.

Sup. Ct. Bk. of Shipman for Supp.

IN THE

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PHINEAS PAM-TO-PEE AND OTHERS,
APPELLANTS,
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No. 211.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellants.

JOHN B. SHIPMAN,
Attorney for the Appellants.

WASHINGTON, D. C.:
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

PHINEAS PAM-TO-PEE AND OTHERS, APPELLANTS,
v.
THE UNITED STATES. } *No.* 211.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Appellants.

In this brief the appellants will endeavor to correct the inaccurate statements in the defendant's brief so far as they are deemed important.

Page 6, at the bottom, referring to the protest of the appellants' counsel to the Secretary of the Interior of July 27, 1895, and of his seeing Cadman, the brief says: "It appears from this protest that Mr. Shipman had had various interviews with Mr. Cadman, and was familiar with what was being done by the Department." The matter would be trivial were it not for the fact that the defendant lays great stress upon his assumed knowledge of what the Department was doing and his alleged fami-

liarity with all that took place, which is based wholly upon that protest. But the paper cannot be tortured into supporting such an assumption. It shows the counsel saw Cadman only once and, read with a little common sense, the letter means that he first saw the Commissioner of Indian Affairs to find out what Cadman (who it seems had been sent into the field some six weeks previous and was engaged in something among the Indians) was doing. Instead of giving him the information or letting him know what the Department was up to, the Commissioner sent him to Cadman, the practice of the office being not to give out such information. Not until he saw Cadman was he informed of what the Department was doing, although the Commissioner might have told him but for the practice mentioned, of which the Court can take judicial notice.

The protest not only does not in any sense bear out the use the defendant makes of it in the brief, but actually negatives the idea that the counsel had any inkling, or was permitted to have any, of what was being done by the Department. Appendix 11.

This protest, which it was hoped might have the effect to open the Indian Office to the claimants, insured the closing of its door against them and their attorney forever.

Page 9. The brief states "the whole fund was $104,626, and it is not disputed that it was all paid out." The whole fund was $156,658.50 (see the statutes cited in claimants' petition, Record 6), and of this $118,552.52 was distributed to the Indians upon the Cadman roll after adding two names recommended by Shelby. Rec. 9. That it does not appear "how many Indians were allowed to participate in that distribution." The number was 272. Rec. 11.

In many places the brief asserts that Shelby's instructions were to add to the Cadman roll any Indians he found entitled to be there, and that he "placed upon the roll all those who shewed that they or their ancestors were on any of the rolls." These statements are all wrong. Instead of being instructed to add any Indians to the roll made by Cadman he was expressly forbidden to do so (Appendix 15), and his report shows he placed none thereon.

Page 29. "The claimants' attorney has found 272 Indians who, he says" (and proves, and the Court so finds, Record 9, Finding IV) "should have participated in this distribution, and therefore proposes that this $78,000 ($78,329.25) be distributed to the 272 Indians whom he has found." (Their names and places of residence were given in the petition in the original suit wherein the judgment in question was rendered.) "What is to prevent him or someone else from finding 272 more next year and getting another $78,000 under this judgment?"

It was the duty of the defendant to take a census of the Indians on the rolls from 1843 to 1866, for which $1,000 was appropriated, the enumerator to account for all of them and, if dead, their heirs, the same as Cadman was instructed to do in regard to the roll of 1866. (Rec. 11.) This was never done, Shelby's instructions not requiring him to take a census at all. (Rec. 14 and 15.) Had the defendant performed this duty the census would have answered the question asked in the brief. But no census of those on the rolls prior to 1866 was ever taken or attempted to be taken by the defendant. It ought not to ask questions which its acts would have answered if it had done its duty.

That the 272 claimants whose names are in Schedule A annexed to claimants' request for findings were entitled to

share in the judgment and funds mentioned is placed beyond dispute by the findings of fact of the court below. (Finding IV, Rec. 9 and 10, Appendix 4 and 5.)

The opinion states that the money distributed was paid to 272 Indians, being those upon the census taken by Cadman of those on the roll of 1866, two omitted ones being added by advice of Shelby. From page 13 to 20, inclusive, of the brief, the defendant insists and labors hard to establish that that census contained all who were entitled to the funds. From the proofs and facts found which the defendant has not deemed it wise to attempt to meet or controvert, it appears, however, there were 272 more Indians entitled to share in the fund, and they are the claimants in this cause. Thereupon the defendant reverses its position as to the correctness of the 1866 census, and urges there may be others over and above what that census and the findings of fact combined show. The defendant is not entitled to be heard upon such inconsistent positions.

But what is the fact? To arrive at the amount each Indian is entitled to in the fund, the whole number interested must be got at. But reasonable proof of this fact the circumstances considered is all that should be required. Before paying out a cent of the money it was the defendants' duty to have ascertained this as was recognized and ordered by Congress in appropriating $1,000 to pay for it. The brief says this could not have been done, but that is poor talk. It could as well have been done under any roll and in the same way as it was done under the roll of 1866 which the defendant claims is so complete as to be correct not only for that but for all prior rolls. Had Cadman's work included the other rolls as well as the roll of 1866, the imaginary difficulty would have vanished. And this is what the claimants' protest

of July 27, 1895, insisted should be done, but the Department ignored the request. The names of the 272 claimants and their residences were stated in the petition in the old case and also over 150 of them were named in that protest, but they were turned down. The claimants had no difficulty in proving their descent and relationship, nor would the Government have had any in finding all entitled to share in the fund, but its agents did not try to do so. Their aim was to not do so, and yet furnish an excuse for not doing it, to the end that "Critcher's Indians" (brief 19) might get all the money. As to there being others who may assert claims to the money, while it is an artificial presumption, yet it will not be assumed the number paid was wrong farther than the evidence shows. In other words, the number paid may be presumed to include all the Indians entitled except and to the extent that the roll is shown to have been erroneous. It is shown and found as a fact to be erroneous to the extent of 272 Indians who are the claimants herein. These and the number paid making 544 in all are the total number entitled to the fund, the amount belonging to each being $287.97. More complete proof of this fact short of what would have existed had the defendant performed its duty and taken a census of all on those rolls, is not attainable by any but the Government. The rolls are necessary to do it, and these the Government alone controls.

Are these facts sufficiently found to base the statement on that the whole number entitled to the fund was 544? The claimant's 8th request for findings of fact below was this: "The total number of Indians recovering said judgment and entitled to share in its payment was 544, of whom 272 are claimants in this case." Appendix . In closing its findings the court adds as a conclusion of law:

"And it is further ordered that the claimants' request for findings of fact be refused as irrelevant and immaterial, except so far as the same are found in the findings of the court," etc. Rec. 10. Finding IV specifically finds the number not paid to be 272. The fact that the number paid was 272, and that those paid and not paid bring the number of descendants entitled to the fund up to 544 persons, is stated in the opinion. Rec. 11. If this be not sufficient the court below might be required to be more specific. It is beyond dispute as to what the fact is.

Pages 29 to 42 of the brief are taken up with the question of distributing a fund among parties claiming differing interests in it, through the agency of chancery proceedings where all are given their "day in court," and a decree is made fixing the rights of the parties to the money, as on pages 15 and 16 of our original brief, we insisted the defendant should have done in this case. The defendant contends the way it adopted, however, was just as good as the way the law requires. On that we differ. The difference is this: Had it followed the way pointed out and provided by law, the claimants would have got their share of the fund, while in the way adopted someone else got it. Had the Department given notice of the distribution or given those claiming or who might claim a right to share in the funds to be distributed, an opportunity to assert their claims—and certainly they were advised and knew such existed—then something might be urged although not much, to excuse that method of doing the business. But even then no one would have been barred by it from asserting his rights in court, for the Department does not possess judicial powers, nor do its bureaus or officers; not even employees detailed on census duty among Indians.

Estoppel.—Neither on this or any other ground can

payment of a debt to any one but the creditor be justified where notice that it is wrong exists, and this the Department had notice of by the letter of July 27, 1895. Besides the record in the old case contained the names of these claimants and also their residence (Appendix 8).

The brief (page 46) says: "It would be too much to claim that the appellants stood by and said nothing for the purpose of inducing the United States to pay out this fund erroneously." Is it not also too much to claim they stood by and saw *their* money paid away and did not try to say something to stop it and to get it themselves? Presumptions spring from the way people usually act under given conditions. When their money interests are involved it cannot be presumed they kept silent or at least did not attempt to be heard in an effort to secure it.

But an estoppel admits a liability and is but an excuse for not paying or performing it. It is a defence and must be pleaded and the burden of proof to maintain it rests upon the one claiming it. It is not a favorite of courts of justice for it is against the merits of the case and hence must be strictly proven by the one invoking it as a shield against an honest claim. All elements constituting this defence must be established by proof and cannot be eked out by presumptions, especially unreasonable ones. The court below did not find the fact of estoppel, but negatived it by saying the defendant "was not without notice" of our rights. Rec. 14. Whenever such notice exists an estoppel is impossible.

The brief contains very many inaccurate statements of fact beginning with page 40 and continuing to the end of it. On this question, which will not be followed in detail, the top of page 46 containing a summary of the alleged facts upon which it rests the claim. Three of them will be noticed:

1. *Silence.*—This is not proven, and the letter of July 27, 1895, proves the contrary. And the record in the original case, containing the names and residences of these claimants, charges the defendant with notice and knowledge of their rights. This disposes of the 3d summary also.

4. "The United States distributed the fund, relying upon the fact that every claimant would come forward and establish his claim." Why, then, did it order a census of them to be taken? Why, then, did it appropriate $1,000 to pay for what the defendant relied upon each claimant to do without pay? Why did it send Cadman out to find those on the roll of 1866? Why was Shelby detailed? Were these persons sent out merely to see the procession of claimants coming in? The proposition will not bear investigation. And yet all those things must affirmatively appear, and moretoo to make out an estoppel. Any number of inaccurate statements of fact and deductions of fact have been passed over without mention, with the purpose of only troubling the Court with those which might have a bearing on questions affecting the result aimed at in the case.

If it is not well found that the total number of Indians entitled to the fund in question is 544, then the Court is respectfully asked to require the Court of Claims to find specifically upon the claimants' 8th request for findings of fact on that point. If the number stated in the opinion at 544 is correct, an outside claimant does not exist, not to mention the statute of limitations which would shut him out.

JOHN B. SHIPMAN,
Attorney for Appellants.

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No. 211.

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Brief of Atty. Gen'l. (illegible) Button
for Appellees.

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OCTOBER TERM, 1902.

PHINEAS PAM-TO-PEE AND OTHERS, appellants,
v.
THE UNITED STATES.
} No. 211.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WILLIAM H. BUTTON,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

2404

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

PHINEAS PAM-TO-PEE AND OTHERS, appellants,
v.
THE UNITED STATES.

No. 211.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal by the claimants from a judgment of the Court of Claims rendered on May 20, 1901, dismissing the claimant's petition.

In pursuance of the policy of the United States inaugurated during the first half of the last century, having as its object the removal of the Indians from lands east of the Mississippi River to those west of the Mississippi, the United States incurred certain obligations under the treaty of September 26, 1833 (7 Stat. at L., 431), to the United Nation of Chippewa, Ottawa, and Pottawatomie Indians, in the nature of agreements to pay said Indians certain annuities from time to time.

In a supplement to that treaty entered into the next day, September 27, 1833 (7 Stat. at L., 442), it was agreed that a certain portion of said Indians might

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remain in the Territory of Michigan "on account of their religious creed," and that the Indians so remaining should be entitled to receive their just proportion of annuities that should become due under the terms of the said treaty.

Various payments were made to the Indians on account of these annuities, part of the payments being made to those who had emigrated and part being made to those who remained in Michigan under the supplemental treaty above referred to. And finally, in 1866, the United States undertook to settle up the whole matter by a certain payment, the portion going to the said Indians who remained in Michigan being $39,000. (27 Court of Claims, 406.)

Congress, however, in 1890 passed an act (26 Stat. L., 24) giving the Court of Claims jurisdiction to try all questions arising out of treaty stipulations between the United States and the Pottawatomie Indians of Michigan and Indiana, irrespective of said settlement.

Under the provisions of said act two petitions were filed in the Court of Claims, one on April 14, 1890, No. 16743, in behalf of certain Pottawatomie Indians by John Critcher, who described himself as their authorized attorney; the other on November 5, 1890, No. 16842, in behalf of Phineas Pam To Pee and 1371 other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney. (27 Court of Claims, 410.)

These two cases were consolidated on January 8, 1891 (finding 2), and after extended hearings the

Court of Claims rendered judgment in favor of said Indians for the sum of $104,626, which judgment was affirmed by this court (Appendix, p. 10).

Neither the Court of Claims nor this court attempted to enumerate the particular Indians who were entitled to this money. The Court of Claims refused to enter upon such an inquiry, and said (27 Court of Claims R., p. 414):

> Congress have recognized by the very title of the act a claimant designated as the "Pottawatomie Indians of Michigan and Indiana," and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the Government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians.

After affirming the judgment of the Court of Claims in regard to the amount due to the Indians in Michigan, whoever they might be, this court said (148 U. S., p. 703):

> How the moneys so awarded should be distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition.

After quoting the language of the court below, this court further says:

> On the other hand, it is contended, with great show of reason, by the petitioners who are

represented in case No. 1125 (16842 in the court below), that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently.

It is to be observed that the court below found as a fact (see finding 10) that the average proportion between the Indians who removed west and those who remained was as 2,812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

The petitioners, however, number 1,371 in case No. 1125, but the number represented in No. 1133 (16473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1125 that only 91 Indians are actually represented in case No. 1133, and that the other 200 Indians are among those represented in case 1125.

But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians entitled to distribution are represented by the respective attorneys or agents.

Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be

dealt with by the authorities of the Government when they come to distribute the fund.

As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the Government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the Government in paying out the fund. (*United States* v. "*Old Settlers*," ante, p. 509.)

Consequently, the distribution of the $104,000 was left to the Department of the Interior, under such light as it could get from the opinions of the Court of Claims and the Supreme Court. Congress appropriated a sum sufficient to pay the judgment and made a further appropriation of $1,000 to defray the expenses of taking a census of the Indians entitled to participate. (29 Stat. L., 894.)

It appears from the findings of fact made by the Court of Claims in the original suit that certain payments of amounts due from annuities and other sources were made to the class of Indians who were entitled to remain in Michigan under the treaty of September 27, 1833. These payments extended from 1843 to 1866, and the pay rolls on which the payments were made were set forth in finding 7 (27 C. Cls. R., 405, 406). The amounts thus paid were due to the same class of Indians that was entitled to the amount of the judgment rendered by the Court of Claims. In fact, that

court treated the amounts paid under those pay rolls from 1843 to 1866 as part payments upon the amounts claimed to be due in that suit, and deducted the amounts so paid from the total amounts due to said class of Indians. It is therefore evident that the United States supposed, at the time it made those payments from 1843 to 1866, that it had located the individual Indians who were entitled to participate in those annuities, and it must follow that they are the same ones who the United States at that time supposed were entitled to everything that might be due to those who remained in Michigan under said treaty.

When the Interior Department came to distribute the money carried by the judgment of this court, it appointed Mr. John Caduan as an inspector, and instructed him to make a census of those who were entitled to participate in said judgment, and to confine such census to those Indians who appeared on the pay roll of 1866 and the descendants of Indians on such roll who had died since.

It seems that few, if any, of the Indians represented on the pay roll of 1866 were included in the petition filed by Mr. Shipman, and thereupon Mr. Shipman, on July 27, 1895, protested to the Secretary of the Interior against such a method of distribution, stating that all Indians and descendants of deceased Indians who appeared on any of the said pay rolls from 1843 to 1866 should be included in said enumeration. (Appendix, p. 11.) It appears from this protest that Mr. Shipman had had various interviews with Mr. Cadman and was familiar with what was being done by the Department.

The Commissioner, on January 9, 1896, submitted to the Secretary an argument to the effect that it would be impracticable to include any Indians who did not appear on some of the pay rolls from 1843 to 1866, and recommended that the Indians who did appear on such pay rolls, or any of them, should be included. The Secretary agreed to this and so notified the Commissioner on January 10, 1896 (p. 14). In the meantime Mr. Cadman had completed his census, which showed all the Indians and the descendants of Indians who were on the pay roll of 1866. Thereafter the Department instructed a special Indian agent, Mr. Marcus B. Shelby, on February 5, 1896, to proceed to Michigan, Indiana, and Illinois, to examine and report upon the claims of various Indians, which had been filed in the Department. He was also informed that any Indians who could show that they or their ancestors were upon any of the pay rolls from 1843 to 1866 should be added to the enumeration already made by Mr. Cadman. He was also instructed to post notices of his coming and give the Indians timely advice of the object of his visit. He was also furnished a copy of the Cadman census (Appendix, p. 14). Mr. Shelby made his investigation and reported March 14, 1896 (id., p. 15). It appears from this report that Mr. Shelby posted notices of his visit and its object, and also advertised the same in the local newspapers. It also appears that, in addition to the claims of those Indians whose names had been given to him by the Department as claimants, he

heard the applications for enrollment of a number of other Indians who, in his judgment, had no standing, as they could not show their descent from anyone on any of the pay rolls. It also appears that a long list of Indians was forwarded to the Indian office by D. K. Foster, of Bradley, Mich., which was afterwards withdrawn, as it seemed impossible to prove that these Indians were the descendants of any of those on the pay rolls.

The result of Mr. Shelby's investigation was the addition of two names to the census made by Mr. Cadman. Thereafter the Department distributed the whole sum of $104,000 to the Indians on Mr. Cadman's census, with the few additions made by Mr. Shelby. (Finding III, p. 8.)

The petition in this case is filed on behalf of Phineas Pam-to-pee and a large number of other Indians, stating that they were entitled to be enrolled and receive a proportionate share of said judgment, but that the same was not paid them. It is claimed that there are 272 such Indians, and that they are entitled to the aggregate sum of $78,329.25, and judgment for that amount is demanded.

The theory on which the claimants' case proceeds is that the distribution made by the Interior Department was confined to the Indians and descendants of Indians who appear on the pay roll of 1866; that the Indians and descendants of Indians who appeared on previous pay rolls, but not on that of 1866, were denied enrollment.

It further appears that the Indians represented in this case are descended from Indians whose names were enrolled on the aforesaid pay rolls in 1843, 1844, and 1866. As a matter of fact but few, if any, of them were on the pay roll of 1866, but they were mostly on the pay rolls of 1843 and 1844. (Finding X, Record, p. 10.)

It does not appear from the findings in this case to what individuals the one hundred and four odd thousand dollars was actually distributed by the Interior Department, nor how many Indians were allowed to participate in that distribution. The whole fund was $104,626, and it is not disputed that it was all paid out, nor is it disputed that the Indians to whom it was paid were of the class included in the judgment of this court and of the Court of Claims, and therefore entitled to receive some part of said fund. Neither does it appear that these Indians here represented and the ones paid are all the Indians whose ancestors appeared on some one of said pay rolls.

It therefore appears that there is not enough information in this record to indicate how large a part of said fund should be distributed to the 272 Indians who are represented in this proceeding, provided the court should be of the opinion that those Indians are entitled to receive some portion at this late date.

There is another consideration that leads to the same conclusion. These Indians lost their tribal relation at the time of the making of this treaty. When they so lost their tribal relation, they came under the operation

of the laws of the States in which they lived and were emancipated from any tribal control.

Eastern Band of Cherokees v. *The United States*, 117 U. S., 288;
United States v. *Boyd*, 68 Fed. Rep., 579;
Lowry v. *Weaver*, Fed. Cas. 8584.

In the Cherokee case above cited the situation was very similar to that of these Michigan Indians, and it was there said:

> The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves had been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian Office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws. As well observed by the Court of Claims in its exhaustive opinion, they have been in some matters fostered and encouraged by the United States, but never recognized as a nation in whole or in part. (20 C. Cls. R.)

All these annuities and payments that were adjudged to be due to these Indians became due after such tribal relations had ceased. Consequently they were

due at certain specific times to certain individual Indians.

It appears from the record in this case that the judgment was distributed not per stirpes but per capita. (Record, p. 9.) That is to say, all the Indians discovered were allowed to participate equally in the fund, irrespective of the generation to which they belonged. The son of an Indian who appeared on one of the pay rolls was allowed only the same amount which each of, say, five grandchildren of an Indian on one of the pay rolls was allowed. They should have taken by representation. The aggregate of the five shares of the five grandchildren mentioned should have equaled the share of the son of the original payee. The consequence is that the whole judgment was distributed on a wrong basis. The payments became due to individuals at various times. The record discloses no reason why the estate of the individual to whom such payment was due is not entitled to the whole of such payment.

If anyone on the pay rolls at the time the annuities became due died without heirs who could inherit, there is no reason why his share should not escheat. It is perfectly evident that a mere enumeration of the Indians, and an equal division among them, does not fulfill the requirements of the situation.

The result of these considerations is that the claimants here have not shown enough facts to enable this court to enter judgment for a specific amount, even if they are entitled to the further distribution. They

must show not merely the fact that their ancestors were on these pay rolls, but they must show the degree of their relationship, and that they are the legal heirs of such ancestor. They must further show the same things in regard to all the parties who did actually get the money, for it is impossible to tell without such information what share ought to have gone to them.

The United States may have been justified in distributing these annuities per capita at the time they actually became due, because such may have been the reasonable interpretation of the contract. But when the annuities did become due, the parties entitled to them took a vested right therein which could not be divested by the retention of the funds in the possession of the United States for fifty years. The moment a certain individual became entitled to a certain portion of an annuity which had accrued, he evidently had a right to it which could not be modified by his decease or the fact that his neighbor had a larger family.

The result of the whole discussion is that if the matter is to be opened an accounting *de novo* will have to be taken in which not only the Indians now claiming but those who actually received the amount of the judgment should be included. It is possible that many of them did not receive what they were justly entitled to, and, in fact, such must be the case when the manner of distribution is considered.

It follows from this that the case is not in such a condition that any final judgment can be rendered here, and the only questions become (1) whether or

not it appears from this record that these 272 Indians are among those in whose favor the said judgment was rendered, and (2) if so, whether or not they are barred from their right to recover their proportion by the distribution which was made by the Interior Department or by their conduct in relation to such distribution.

The first question to be considered is what the record shows as to who the Indians are who should have participated in this judgment.

There is some obscurity in the findings of the court below in regard to this point, but it is submitted that the effect of those findings is that the only class entitled to participate in the distribution are those whose names appeared on the pay roll of 1866.

THE PAY ROLL OF 1866 IS THE BEST EVIDENCE OF THOSE ENTITLED TO DISTRIBUTION.

Before considering whether or not distribution was made upon the basis of the pay roll of 1866 alone, the court should consider whether or not the findings of fact and the opinions of this court and the Court of Claims in the case in which the judgment was rendered did not decide that the pay roll of 1866 was the most reliable evidence as to what Indians were entitled to participate in the judgment. It is evident from the opinion of this court and that of the Court of Claims that both tribunals were impressed with the difficulty of obtaining any evidence at the present date to indicate what Indians were entitled to receive this money. With one accord they left the question to the Indian Office upon the indications contained in the old pay rolls.

In arriving at the amount which was due to the Indians who remained in Michigan, the Court of Claims was forced to and did rely upon these pay rolls as the only reliable evidence to indicate how large a proportion of the Indians remained in Michigan who were entitled to the annuities. It relied upon these pay rolls as showing the average number of Indians who went West and the average number of those who stayed in Michigan under said treaty, and on the basis of such average numbers the proportion of the money which should be paid the Michigan Indians was determined at $104,000. In adopting this method of arriving at the respective numbers of Indians who emigrated and those who did not, the Court of Claims says in regard to these pay rolls as evidence:

> The Government officers, commencing with 1843, in the distribution of the annuity of $18,000, after an examination and inquiry satisfactory to themselves, and presumably to do justice between the Indians remaining and those emigrating, ascertained and determined the number as coming within the article giving the right to stay at 253, and for a period of twenty-three years the defendants distributed the annuity of $1,587.50 and the $39,000 upon a basis ranging in numbers from 204 to 260, the first being in 1843 at 253, and the last being in 1866 at 230. During all of that time the United States, by its officers and agents, proceeded in the belief that those numbers represented the class which was to participate in the annuity fund without being compelled to re-

> move beyond the Mississippi with the main body of the nation, and the claim now made in 16842 for more than 1,400 first assumed definite form when the statute of our jurisdiction was passed. (27 C. Cls. R., 417.)

Further, the court refers to the tabulation of these pay rolls and certain earlier ones in the following language:

> And it seems to have been recognized in such a way as that it becomes to the court the most reliable data on which to predicate a finding of the relative proportion of those emigrating and those remaining (p. 418).

It is evident from this that the Court of Claims took the position that these pay rolls are the best evidence that can be produced on any question which they purport to decide.

The question which that court was deciding upon the strength of these pay rolls as evidence was the number of Indians who remained in Michigan as compared with those who went West; but the same reasoning applies to anything else which is indicated by these rolls. It is consequently submitted that the pay roll of 1866 is the best evidence of who the Indians at that date were who had appeared on the earlier pay rolls and who were the descendants of those who had so appeared and had died in the meantime. The first roll of 1843 indicated who were entitled at that date. The second pay roll of 1844 should indicate which ones were still alive and what descendants of those who had died during the year were entitled to

participate, and so on down to 1866. The result must be that the pay roll of 1866 embodied the judgment of the contemporary Indian officers upon the matter of the original claimants and the descendants of those who had died. No reason can be suggested why any Indian who was on one pay roll should be dropped from the next, unless there was some good reason why he was not entitled to participate in these moneys; nor can it be suggested why the descendants of an Indian who had died should not have been added to the subsequent pay rolls upon the decease of their ancestor.

It is further probable that some who appeared on the first pay rolls were dropped for good reason. The Indians entitled to remain in Michigan were those who entertained a certain religious belief now undisclosed. It appears that the Indians were very loath to leave Michigan and many insisted on staying who had no right to stay under the treaty. It is said in finding 11, 27 Court of Claims, 408:

> XI. Many of the Indians residing in the State of Michigan, on said reservations, were opposed to emigrating west with the main tribe and refused to go. They were dissatisfied with the treaty which made it their duty to go, and the result was the Government had to resort to force to compel their departure. In the struggle incident to the enforcement of the treaty many Indians refused to go. Those Indians did not come within the supplemental clause of the treaty of September 27, 1827, as construed by the agents of the Government. In evading the officers and agents of the Government they

scattered into different parts of the State, many of them going to the northern portion. It is impossible to determine with substantial accuracy the number so remaining, but they outnumbered the Indians who remained by consent of the agents of the Government as coming within the exception as to removal. The two classes numbered 1,100.

When it came to distributing the earlier annuities, it is doubtless true that some of this larger class of Indians, who had no right to stay, got their names on the rolls and were afterwards gradually weeded out by the Indian agents as they learned of the errors.

Furthermore, the money distributed was divided among the various families of Indians, according to the number in such families. Consequently, the children of each Indian were represented on each pay roll for the purpose of determining the amount which should go to that family. How they could get dropped from succeeding pay rolls does not appear.

Furthermore, there was a period of twenty-three years, from 1843 to 1866, during which any Indians who were entitled to participate in these moneys could have gotten on the rolls, and doubtless those who were entitled did so.

The pay roll of 1866 was the one on which the largest amount of money ever distributed to the Michigan Indians was divided, and it was supposed at that time that this payment was a payment in full for all moneys due said Indians. It may consequently

be supposed that this roll was prepared with more accuracy than any of the previous ones.

For all the reasons above given, it is submitted that the roll of 1866 is the most accurate evidence of who were the Indians at that time who had rightfully appeared on previous rolls and who were the descendants of those who had at any time so appeared.

If the Court of Claims held to the same reasoning it adopted in arriving at the total amount due, it must have come to this conclusion.

If it was incorrect to distribute this judgment to those only who appeared on the roll of 1866 and their descendants, it was incorrect to distribute the payment of $39,000 to such persons in 1866.

This is equivalent to saying that the Court of Claims can now better determine from oral evidence who such Indians were than could the officers of the Government at that time. This is contrary to the whole spirit of the decision of this court and the decision of the Court of Claims.

Looking at the language used by that court, it seems that the court intended the last pay roll to govern. The only statement of what Indians were entitled to receive the judgment is contained in finding XIV, and is as follows:

> XIV. The Indians mentioned in finding VIII, described as "those remaining East and coming within the supplemental articles to the treaty of September 26, 1833, are those parts of the Pokagan and Nottawasipi bands to whom the payment mentioned in the said letter of Hon.

E. B. French was made, as shown in finding VII." (27 C. Cls. R., 409.)

The letter of Mr. French referred to contains a table made up from the rolls from 1843 to 1866, inclusive, and then makes special reference to the last payment of $39,000, setting forth the language of the receipt which the Indians gave when that payment was made to them.

The language of Finding XIV is not that this judgment belongs to those to whom "payments" were made as mentioned in the letter of Mr. French, but to those to whom "the payment" was made as mentioned in said letter. The only payment which Mr. French particularly discussed was this payment made in 1866 of $39,000 under the pay roll of that date.

It is natural that the court should have adopted this evidence, and it is clear that it did so adopt it. This is further evident from the opinion of the court.

It seems that the Indians who actually got the money carried by this judgment were those represented in Mr. Critcher's petition, No. 16743. The court says:

> There is no dispute as to the amount paid the claimants since 1836. Besides the amount of $39,000 under said resolution, the claimants in 16743 have received the further sum of $36,162.50, making in the aggregate the sum of $75,162.50 (p. 416).

It is evident from this statement that the Court of Claims thought that the Indians represented on the pay roll of 1866 who received the $39,000 represented

the same Indians who had appeared on the previous pay rolls back to 1843 and who had received during that time the sum of $36,162.50. In other words, this court was convinced that the last pay roll contained the best evidence as to who did actually represent the Indians on the earlier pay rolls.

It is therefore submitted that it has already been decided in a case in which the present claimants were parties, and by which they must be bound, that the pay roll of 1866 accurately represented the Indians who were entitled at that time to receive all annuities and other sums that were due to that portion of the Pottawatomie tribe which had the right to remain in Michigan under the treaty of September 27, 1833. If this be so the Interior Department was perfectly right, although it did distribute the judgment according to the Cadman census, which represented only those who appeared on the pay roll of 1866. If the court is convinced that this position is correct, then, inasmuch as all or a large part of the claimants in this suit are only on the rolls of 1843 and 1844 and not on the roll of 1866, it must follow that most of them are in no event entitled to a share of the fund.

THE UNITED STATES WAS DISCHARGED BY THE DISTRIBUTION MADE.

It is evident from the statement already made that the money was distributed as best it could be to those who were represented, not only on the pay roll of 1866, but on all the pay rolls back to 1843.

After the Cadman census, which was confined to the pay roll of 1866, was made, Mr. Shelby was sent west

under instructions to add to the roll any Indians who were represented on the older pay rolls and who had been omitted on the Cadman census. Mr. Shelby heard the claims of a large number of Indians and placed upon the roll all those who showed that they or their ancestors were on any of said rolls. It further appears that he had advertised his trip extensively and had given everyone an opportunity to prove his claim.

Under these circumstances, if some were omitted, can they now recover? An answer to this question must be sought in the nature of the original proceeding in which the decree was entered and in that decree itself.

If the Pottawatomie Indians of Michigan had retained their tribal relations, there would have been no difficulty in the matter. They would have sued as a tribe and the money would have been turned over to them as a tribe, and the tribal officers would have been responsible for its proper distribution. As it was, all tribal relations of those who remained in Michigan ceased upon the making of the treaty of September 27, 1833. That portion of the tribe which went west maintained its organization, but those who remained in Michigan did not do so. The Court of Claims said:

> In ceasing to be a part of the united nation it did not retain any part of the political or corporate power of the tribe; that was undivided and still inherent in the body which emigrated beyond the Mississippi pursuant to the terms and requirements of the treaty. The portion remaining may have acquired a right to share

> in the annuities, but the corporate power of the tribe remained intact and incident to the larger body which emigrated. (27 C. Cls. R., 412.)

The situation, therefore, when Congress passed this jurisdictional act disclosed a large number of individuals having similar interests in a common fund in the possession of the United States. The right of each individual against the United States, the trustee of the fund, was based upon the same facts. The amount of the fund and the portion to which each individual was entitled depended, of course, upon the number of such individuals.

The history of the distribution of this fund by the agents of the Interior Department; the fact that a new suit is brought by several hundred who, it is claimed, were omitted in the distribution, although entitled, are sufficient evidence that it is no small labor to indicate by name the Indians scattered throughout Michigan who were, as a matter of fact, entitled to participate in this judgment.

The Court of Claims said that any Pottawatomie Indian of Michigan had a right to bring suit, and that the petitioners in such a suit were "subject only to the qualification or limitation of being Pottawatomie Indians of Michigan and Indiana." (27 C. Cls. R., 413.)

As an ordinary proposition every suit in equity must join as parties all who have an interest in the matters which are to be adjudicated in such suit and whose interests will be affected by a proper decree therein. If this rule were inflexible, it would result in more injustice than the injustice of adjudicating the rights of some

in a proceeding to which they are not parties. The result has been that equity has recognized certain well-defined exceptions to the general principle above referred to, and has allowed rights to be adjudicated when all the parties affected have not been before the court. The basis of this exception is, first, the prevention of a multiplicity of suits, and second, the impossibility of always joining every one affected when such persons are exceedingly numerous or can not be ascertained. It is perfectly evident in this case that if it had been necessary to make all the Indians who were entitled to participate in this fund parties either plaintiff or defendant no suit could have been brought. As soon as a suit was brought it would be subject to abatement upon the discovery of another Indian. Consequently it was essentially one of those cases in which equity allows a suit to be brought by one of a class to adjudicate not only his own rights but the rights of all similarly situated. Frequent illustrations of this procedure are met with, as cases in which one creditor sues in his own behalf and in the behalf of all similarly situated to procure his debt out of a specific sum: the case of a legatee who sues in his own behalf and in the behalf of others similarly situated; or one of the next of kin, or in fact one of any extensive class of persons who are unknown, without the jurisdiction, or inaccessible for any other reason. The precedents and the reasons for such a proceeding are numerous.

After stating that, as an ordinary proposition, everyone interested in the subject-matter of a suit in equity

must be made a party to that suit, Justice Story says there are certain exceptions to the rule (Equity Pleadings, 9th edition, sec. 207 a):

> So, wherever a great practical inconvenience would arise from a strict application of the general rule, there the court has power to relax it in order to prevent that which is laid down for the purposes of justice from working the contrary: as, for example, where there is a small property to be divided among a large number of *cestuis que trust*, who are foreigners resident abroad. The like exception would seem to apply where the *cestuis que trust* (or beneficiaries) are very numerous or the description of them is so general that it is difficult or impracticable to ascertain, in the first instance, who are all the persons included therein, or many are unknown or are resident abroad.

He further says (sec. 105):

> Such a bill is maintainable not only upon the ground of the supposed uncertainty of the persons answering the description, but also where they may be known, and yet they are exceedingly numerous.

In the case of *West* v. *Randall* (Fed. Cas., No. 17424) Mr. Justice Story gave a large number of instances in which such a bill would be proper, and said:

> The principle upon which all these classes of cases stand is that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making

other persons parties; and the latter it deems the least evil, as it can consider other persons as quasi parties to the record, at least for the purpose of taking the benefit of the decree and of entitling themselves to other equitable relief if their rights are jeoparded. Of course, the principle always supposes that the decree can, as between the parties before the court, be fitly made without substantial injury to third persons. If it be otherwise the court will withhold its interposition.

Again, speaking for the Supreme Court of the United States, in *Mandeville* v. *Griggs* (2 Pet., 482), Mr. Justice Story said:

> It is well known that there are cases in which a court of equity dispenses with such a proceeding when the parties are very numerous or unknown and the adoption of the rule would essentially impede if not defeat the purposes of justice.

These principles are again approved by the Supreme Court in the case of *Smith* v. *Swormstedt* (16 How., 288). Mr. Justice Nelson said:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the

> decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

In the case in which this judgment was rendered in favor of these Indians all the considerations that make such a procedure desirable were present. The parties were exceedingly numerous and exceedingly uncertain. Consequently the suit was properly brought by certain individuals on behalf of themselves and others similarly situated under the above decisions.

That the suit which was brought in this matter was of such a character there can be no doubt.

In the petition filed by Mr. Shipman it was specifically stated that it was for the benefit of all Indians entitled. (148 U. S., 695.)

In fact, unless the suit was for the benefit of all, the court could not have entertained jurisdiction. All the parties interested either must be before the court or the suit must be for their benefit.

> Story's Equity Pleadings, secs. 98–99.
> *Leigh* v. *Thomas*, 2 Ves., 312.
> *Brown* v. *Ricketts*, 3 Johns. Ch., 553.

It is therefore evident that the suit must have been dismissed if it had not been intended to be for the benefit of all concerned.

In fact, it does not seem to be disputed by the

claimants in this suit that the original suit was brought for the benefit of all interested.

In such suits anyone who has an interest in the matter in controversy can come in and claim that interest, although he is not made a party to the bill.

> Story's Equity Pleadings, sec. 99.
> *West* v. *Randall*, Fed. Cas., 17424.
> *Waite* v. *Temple*, 1 Sim. & St., 319.
> *Gifford* v. *Hort*, 1 Sch. & Ler., 409.

In the Federal case above cited it was said:

> Yet in these cases, so solicitous is the court to obtain substantial justice that it will permit the other parties to come in under the decree and take the benefit of it or to show it to be erroneous, and award a rehearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice. (Coop. Eq. Pl., 39; 2 Madd., 144, 145; *Cockburn* v. *Thompson*, 16 Ves., 321.)

It is therefore evident that any one of the claimants in the present suit had a right to enter as a claimant in the suit in which the judgment was rendered or to press his claim before the Indian Office had distributed the judgment.

The origin of this procedure and the reasons which led to its allowance have been thus fully gone into for the reason that an understanding of these matters is essential to a determination of what the proper method of closing up such a suit is.

Such a procedure must lead to certain results without which it would be hazardous or impossible. Is it

possible that a court of equity at the instance of one of a class could proceed in such a suit to adjudicate the entire amount of the fund to which such class was entitled, and at the same time some representative of that class, who was not made a party to the proceeding, could successfully maintain another and a later suit to readjudicate the amount of the fund due to such class? Such a conclusion would negative the right to bring any such proceeding, for it could never be done with safety.

Again, can it be possible, when such a suit has been brought and the entire fund that belongs to the class has been ascertained and it has been adjudged that all of that class have a right to participate, that the fund can not be distributed until each one who actually is entitled to a share has been brought before the court? If such a conclusion were possible, it also would negative the existence of any such procedure, for the very basis of the procedure is that the parties are so numerous or so undefined that they can not be found in the first instance. If it were necessary to actually find them before a distribution could be made, the whole proceeding would be nugatory. It must then be concluded that a distribution can be made even though some entitled to share be left out of such distribution.

Is it then possible that one who was left out can again bring a suit and recover from the defendant, who held the fund as trustee, his distributive share which has already been given to those who did come into court and participate? But one answer to these

questions is possible. If the claimants' case can succeed, the obvious and only possible answers to these questions must be incorrect.

If it had been necessary to find all these Indians, the suit could not have been brought in which the judgment was recovered. If a distribution could not have been had before all such Indians were found the money would still be in the Treasury. If the theory of the claimants is correct, the United States, as trustee for these Indians, was not discharged by the former judgment and distribution and must pay again upward of $78,000.

The claimants' attorney has found 272 Indians who, he says, should have participated in this distribution, and therefore proposes that this $78,000 be distributed to the 272 individuals whom he has found. What is to prevent him or some one else from finding 272 more next year and getting another $78,000 under this judgment?

All these propositions show the absurdity of any such contention. If a suit can be brought by one of a class for the benefit of a whole class, the judgment in that suit must bind the whole class. If those entitled to that judgment can come in and prove up their claims, it must be that those who do not come in and prove their claims are likewise bound by the distribution.

It has been so held.

First. A decree in such a suit, fixing the amount of the fund to which a class is entitled, is binding on the

whole class although some of them may not have been made parties to the suit and may not have taken advantage of the decree.

Story's Equity Pleadings, sec. 99.
Kenyon v. *Worthington*, 2 Dick., 668.

In the above case one John Cash brought a bill in equity against Mrs. Kenyon, executrix, for the purpose of establishing his debt against the estate which she was administering, and said bill was brought not only in his own favor but in the favor of all other creditors. The will was established, and it was ordered that an account be taken of the assets of the estate and an account of the debts due the various creditors, that advertisements for creditors be had and necessary directions for the payment of debts were given. Thereafterwards John Worthington sued the executors for a debt which he alleged against the testator, notwithstanding the decree above referred to. Thereupon the executrix Kenyon brought the present suit, asking for an injunction against Worthington's suit. It will be noticed that the suit in which the decree referred to was entered was in favor of all creditors, and it does not appear whether Worthington was a party to that bill by name or not.

Lord Eldon granted the injunction, saying:

> Having decreed an account of what is due to all creditors, and having decreed an account of assets and administration of them in payment, will this court suffer its decree to be rendered nugatory by altering the course of administration? Certainly not. It will surely protect the

> executor or administrator in obeying its decrees. The creditors will have justice here and, therefore, let the injunction extend to stay trial.

This is but an instance in which a court has held one not a party but who was represented by a party of the same class to be bound by the decree.

It does not seem to be contended in the present suit that the matter of how much money was due the Pottawatomie Indians of Michigan, as a whole, should be reopened, but it is important in this connection to understand that the decree in that suit is binding upon all parties in interest, in the first place, in regard to the gross amount due such class.

Second. When a distribution is made under a decree of court in such a suit, those who do not come in and claim their shares and prove their right thereto before such distribution, are bound thereby and can not afterwards maintain a suit for the share which they should have received.

In commenting upon the effect of such a decree of distribution, Mr. Justice Story said (Equity Pleadings, sec. 94):

> For in every case in which a decree is made, where the parties, being numerous, are on that account dispensed with and all of them are not before the court, their interests may be incidentally and indirectly affected; as, for example, if in a bill of this sort an account is taken, and there is a decree giving a certain portion of a fund to the parties before the court, the parties not before the court will be bound by that account and decree, and the court will protect

> the defendant acting under the decree and obeying it from future litigation on the points so decided, for otherwise the defendant would really be deprived of all protection.

Further, in commenting upon such a suit brought by one creditor, the same writer said (sec. 99):

> The other creditors may come in under the decree and prove their debts before the master to whom the cause is referred and obtain satisfaction of their demands equally with the plaintiffs in the suit, and under such circumstances they are treated as parties to the suit. If, however, they decline so to come in before the master they will be excluded from the benefit of the decree; and yet they will from necessity be considered as bound by the acts done under the authority of the court.

Further, in speaking of all such suits, he said (sec. 106):

> But, although the court will, in cases of this sort, entertain jurisdiction by creditors, legatees, and distributees on behalf of themselves and all others, and will exonerate the executor or administrator, or other trustee, from all liability in respect to payments of the assets made pursuant to its decree, yet it is not to be understood that such a decree absolutely binds the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor, or administrator, or trustee, yet they have a right to assert their claim

> to a share in the property against the creditors, legatees, or distributees who have received it.

In *Farrell* v. *Smith* (2 Ball & B, 337) the executor proved the will, and certain disputes arising as to who were legatees under it, he filed his bill against those claiming to be legatees, so far as he knew them, and a decree was entered ordering a reference to a master to ascertain upon advertisement what persons were in existence who answered the description of the legatees in the will, they being therein described as a class. Upon such proceeding the whole legacy was distributed. Some years afterwards the plaintiff brought suit against the executor, claiming to be a legatee who had received no payment, and asking that the executor be ordered to pay over a distributive share. The court, however, said:

> It appears to me that nothing could possibly be more injurious to the administration of justice than to grant the relief sought in this case by the plaintiff: indeed, I have never heard of a bill like the present, and I am sure no precedent can be produced in support of it: for what executor would be safe if he were liable to answer for a distribution of assets made under a decree of the court. The bill should have been to reverse the decrees in 1802 and 1803 as erroneous, for it has been brought, not in fact to set aside what the executor has done, but what the court has done in the usual course of proceeding, acting in the best possible manner.

In *David* v. *Frowd* (1 Myl. & K., 200), it appeared that David Williams died intestate, leaving an estate of

about £4,000. David Frowd was appointed administrator. One Ella Church, claiming as next of kin, filed a bill against the administrator for an account and an inquiry as to who were the next of kin, stating in said bill that it was filed on behalf of all of them. Upon a reference to a master a distribution was made of the entire fund. Thereafterwards Mary David filed a bill in the present suit, alleging that she was the sole next of kin. The court held that she was bound by the decree in the suit brought by Ella Church, and that her only recourse was against the parties who had received the money, the administrator being fully protected by the decree. The court said:

> Upon the application of any person claiming to be interested, the court refers it to the master to inquire who are creditors and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the master, within a reasonable time stated; and when that time has expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the master, established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim. But it is obvious that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom

from that where the advertisements are published, or, from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it. It is for this reason that if a party who has not gone in before the master applies to the court after the master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of willful default in not claiming before the master, the court will refer it to the master, to inquire into his claim, and if it be satisfactorily proved, will, in the administration of the estate, give him the same benefit of his title as if he had originally claimed before the master. This is every day's practice with respect to creditors. For the same reason if a creditor does not happen to discover the proceedings in the court until after the distribution has been actually made by the order of the court amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator, who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him.

In *Gillespie* v. *Alexander* (3 Russ., 131), Lord Eldon said:

> If a creditor does not come in until after the executor has paid away the residue, he is not without remedy though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so, but he can not affect the legatees except by suit, and he can not affect the executor at all.

The same principle was adopted by Lord Lyndhurst in *Gregg* v. *Somerville* (1 Russ. & M., 338).

In *Hallett* v. *Hallett* (2 Paige's Ch., 15) a suit was brought by one of a class of legatees in behalf of all to procure a payment of the legacy. The chancellor discussed the various cases in which such a procedure was proper, and stated:

> In these cases to remedy the practical inconvenience of making a great number of parties to the suit, and compelling those to litigate who might otherwise make no claim upon the defendants, or the fund in their hands, a method has been devised of permitting the complainants to prosecute in behalf of themselves, and all others standing in the same situation who may afterwards elect to come in and claim as parties to the suit and bear their proportion of the expenses of the litigation. If such parties neglect to come in under the decree, after a reasonable notice to them for that purpose, the fund will be distributed without reference to any unliquidated or unsettled claims which they might have had upon the same. But if the rights of such absent parties are known and

> ascertained by the proceedings in the suit, provision will be made for them in the decree. (Anon., 9 Price, 210.) In either case the court will protect the defendants against any further litigation in respect to the fund.

This case also approves the case of *Farrell* v. *Smith*, *supra*.

In *Campbell* v. *Railroad Co.* (Fed. Cas., 2366), it appeared that a foreclosure suit had been brought in which certain decrees had been entered. The present suit was brought by certain bondholders who were dissatisfied with those decrees, and who had not been made parties thereto. The trustee had been made a party.

The court held that although the bondholders had not been made parties to the foreclosure suit, yet they were represented by the trustee and were bound by the decree therein. The decision was placed not upon the ground that the trustee under the mortgage was the only proper and necessary party, but upon the ground that the bondholders were represented by the trustee, and any one of them could have come in at any time and been made a party to the suit. The court said:

> This I regard as the proper general rule, growing out of and being merely an application of the more general rule that where parties are exceedingly numerous, and it would be impracticable to join them all without almost interminable delays and other inconveniences which would obstruct and perhaps defeat the purposes of justice, it is not necessary that they

> should all be made parties to a suit in equity: but a suit brought by or against some, in the behalf of all, will be binding on all.

And further:

> The bondholders, if not parties to the suit, were quasi parties, and had the right at any time to intervene and become actual parties.
>
> The present suit, therefore, must be regarded as a suit brought by those who were quasi parties or privies to the former suit, and who, as such, were bound by the decrees rendered therein, unless they can show some ground for setting aside the decree which could be set up by an actual party to the suit.

In *Kerrison* v. *Stewart* (93 U. S., 155) a similar rule was laid down by the United States Supreme Court in a similar case. Mr. Chief Justice Waite said:

> In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party.
>
> The principle which underlies this rule has always been applied in proceedings relating to railway mortgages where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience.

It is evident from these cases that where a suit is brought by one of a class to establish a common right, the decree in such suit is binding on the whole class, so far as the general right is concerned, and when a distribution is made of the whole fund under such a decree, the trustee, or the person in whose hands the fund was, will be fully protected. Most of the cases have stated that this result is necessary in order that any justice may be done. It would seem, however, that the true basis on which such holdings are sustained is that the fund, being within the jurisdiction of the court, is acted upon directly and the proceeding is *in rem*. This is not pointed out in many of the cases, but it is well stated in *Hallett* v. *Hallett*, *supra*. After citing many cases in which the procedure had been applied, Chancellor Walworth said:

> In all these cases the proceedings are *in rem*. And the parties who have the exclusive control of the fund being before the court, the chancellor takes the administration thereof into his own hands, and directs due notice to be given to all parties interested to come in and exhibit their claims and settle their priorities. The court having directed the distribution of the fund and thus deprived the executor or trustee of all control over the same, it will not permit those who have neglected to come in under the decree to proceed in a suit against the executor or party from whose hands the fund has thus been taken for distribution.

The only commentary that can be made upon the case at bar to distinguish it from the principles above

laid down is that, in some of the cases cited, reference was made to a master to ascertain who were the individuals of the class indicated, and upon his report the court itself decreed a distribution, while in this case the court remitted the whole matter to the Indian Office and washed its hands of all responsibility. Whatever may be said of such a proceeding if the class of beneficiaries were an ordinary one, it remains true in this case that no instrumentality could have been devised that was more fitted to discharge correctly the task of locating these Indians than the officers of the Interior Department. A court of equity has some discretion and some latitude in carrying out its judgments.

The Court of Claims practically ordered that the distribution be made by the Indian Office. It could not have made any other order. This court affirmed that order, specifically stating that the circumstances of the case required it. Congress recognized the propriety of the action in appropriating $1,000 to pay the expenses of such distribution, and who can say that any instrumentality more effective than this could have been devised? An auditor from the Court of Claims would have made poor work of determining who these Indians were.

It should be held that the United States adopted the most feasible plan of distribution and that it should not suffer for having complied with a decree of the Supreme Court. It certainly acted in good faith in the matter, and it certainly has once paid all that it owed.

In all the Indian cases that have come before this court none have been found in which the court has undertaken to distribute a fund to individual Indians by its own directions. It has always been done through the Indian Office; and there seems to be a well-recognized procedure to that effect in such cases. Even if the court had ordered that the findings of the Indian Office be reported to it for confirmation, it does not appear that these claimants would have been benefited thereby. None of them presented their claims to the Indian agents, and the list of Indians as made by the Indian officers would undoubtedly have been approved by this court if it had been reported to it.

These Indians were represented by counsel, who made a protest against the first scheme of distribution, which protest was upheld, and the ideas of the counsel for these claimants were carried out as well as they could be by the Indian officers, and it can not be said that these claimants are without fault in standing by and seeing the money distributed. They did know, or at least should have known, what was going on, and then was the time to establish their claims.

In many of the Indian cases that have come before the Court of Claims where it was necessary to distribute a fund to individual Indians, that court has directed the fund to be distributed practically in the same way that this fund was distributed.

Western Cherokees v. *United States*, 27 C. Cls. R., 61.

Journeycake v. *United States*, 28 C. Cls. R., 319.

Whitmore v. *Cherokee Nation*, 30 C. Cls. R., 177.

These cases are referred to in the opinion of the court below.

THESE CLAIMANTS ARE ESTOPPED FROM CLAIMING A SHARE IN THIS FUND.

The ground on which this case was disposed of by the court below seems to be perfectly tenable. It is in effect that these claimants, being represented by counsel, and being parties to the former litigation and knowing that the fund was about to be distributed under an enumeration of the individual Indians which had been made for that purpose, were bound to see to it that their names appeared on the list, and not having done so, but having allowed the United States to distribute the whole fund upon a list which did not include their names, they are now estopped from asking a repayment.

The language of the court below seems to state this position forcibly. It is as follows:

> The authorities cited by the counsel may be resolved into two general classes: One where an officer, such as an administrator or executor, pays away a fund under the coercion of a decree or order of a court having jurisdiction of the fund; the other, where an innocent stakeholder, without fault, negligence, or mistake, pays away a fund to the injury of a negligent party who fails to present his claim in due time. Apart from these authorities there is the great principle of equitable estoppel, that where a man remains silent when he ought to speak he can not be permitted to speak when it will be to the injury of another person who was misled

by his silence. In this case the claimant knew, or could have known, that the census made by an agent of the Interior Department was returned and filed in August, 1895, and that the final decision of the Secretary of the Interior was made in January, 1896. So far the case seems clear. The resulting question is, Were the claimants bound to ascertain between that time and the payment of the fund during the month of November, 1896, that their names were on the pay roll, or might they assume that the direction of the Secretary would be correctly carried out by his subordinates?

The court has reluctantly come to the conclusion that that burden rested upon the claimants. The documentary proceedings in the Interior Department were not completed when the order of the Secretary was made. His decision was his direction that a new pay roll be made, and the circumstances required vigilance on the part of persons whose right to be there had not yet been determined by name to see that their names were duly placed upon the final pay roll. It is the misfortune of these claimants that they did not do so.

The attorney for the appellant in his brief filed in this court (p. 8, etc.) takes the position that it is the duty of a debtor to seek his creditor for the purpose of payment, and that such duty is paramount and can not be evaded, citing

Beach on Contracts, §329.

Jones v. *Ricketts*, 7 Md., 108.

Startup v. *MacDonald*, 6 Man. & G., 593.

The principles announced in these authorities are

not disputed. Ordinarily a debtor is bound to find his creditor in order to discharge the debt. But in the case at bar there are other considerations.

It is a case in which the question of the amount of the debt and the individuals to whom it was due was a matter of great difficulty.

It is further a case in which a fixed sum was due to such creditors as a class, the share of each individual depending primarily upon the number of such individuals in the class. Under such circumstances it is probable that in case any individual claimants did not know, or were not bound to know, that the money was about to be distributed no equitable estoppel could arise. But these claimants did know, or should have known, what was about to occur, and if they stood by, knowing that the United States in good faith was about to place itself in a position wherein it would be damaged in case such claimants insisted on sharing in the money at a later date, and, knowing these facts, remained silent until after the United States had assumed such position, it is evident that such claimants should be held to have estopped themselves from insisting upon their rights at this date.

The facts upon which the equitable estoppel in this case should be based are as follows:

These claimants were represented in a proceeding in which a judgment was rendered and were represented before the Interior Department during the time that preparations for a distribution were being made. They knew or should have known the following facts:

That a judgment had been rendered in favor of

themselves among others; that Congress had appropriated sufficient funds to pay said judgment; that its distribution had been left to the Interior Department; that the Interior Department had taken measures to ascertain the individuals entitled to participate; that such procedure was not satisfactory to them, but they protested against it; that on January 10, 1896, the Secretary of the Interior upheld their protest and adopted the plan of enrollment insisted upon by them; that a special agent was sent to their country early in 1896 to revise the pay roll already made by Mr. Cadman, in order that it might conform to the contention made by these claimants through their attorney; that said special agent did proceed to their country and posted notices of hearings and heard all who presented claims; that on March 14, 1896, said special agent made a report which did not include the names of these claimants; that in the reasonable course of events a distribution of the whole fund would be made by the Department on the basis of said pay roll and report; that they were entitled to be on said pay rolls; that they could show this fact and that the United States was about to pay out all the money without giving them their share.

Having knowledge of these facts, they did nothing, but remained silent, and the United States did pay out all the fund in the manner indicated, relying upon the conclusion that all the parties entitled to participate had been found and enumerated.

The above statements are fully supported by the findings of fact and the record in this case, and present all the elements on which to base an equitable estoppel.

1. There was their silence in the face of a situation which would lead the United States to put itself in a position in which it would be subjected to loss in case the claimants are allowed to repudiate their conduct.

2. The facts entitling the claimants to participate were known to the claimants at that time.

3. The facts concerning their right to participate were unknown to the United States at that time.

4. The United States distributed the fund, relying upon the fact that every claimant would come forward and establish his claim.

5. As a result, the United States acted in the matter in such a manner as to change its position for the worse.

The essential elements upon which to base such an estoppel are well enumerated by Mr. Pomeroy in his work on Equity Jurisprudence (sec. 805, 2d edition), and all these elements are present in this case, with the exception of one which Mr. Pomeroy has mentioned and commented upon as follows:

> 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims a benefit of the estoppel.

It would be too much to claim that the appellants stood by and said nothing for the purpose of inducing the United States to pay out this fund erroneously, but

it is not necessary that such an element of intention or expectation should be present in order to work an estoppel. (Pomeroy's Equity Jurisprudence, 2d edition, section 805, and note 1, section 806.)

In these sections and the exhaustive note referred to it is very clearly pointed out that the element of intention or of fraud is not necessary in order to work an equitable estoppel, unless it is sought to deprive a person thereby of an interest in or title to real property, in which case there seems to be a theory that a fraudulent intent is essential in order to avoid the statute of frauds.

The cases referred to and the above discussion seem to establish the principle beyond question.

The statements in the brief for the appellants to the effect that it was impossible for the claimants or their attorney to ascertain the situation appears to be without foundation in this record.

It is stated in the brief for the appellants, pages 9 and 10, that the United States can not rely upon the estoppel for the reason that the United States was a party in the litigation in the Court of Claims and in this court, where the judgment was rendered, and knew all about the claims of these appellants. This statement is not correct. It is true that the United States knew of that litigation and that there was a certain class of Indians entitled to this fund, but it is not true that the United States knew who the individual Indians were, nor is there anything in any of those proceedings which would give the United States any light on that subject. The only point at issue there was whether or not there was a fund belonging to the class

of Indians. There was nothing disclosed in those suits which would aid the United States at all in the distribution of the fund. The fact that there was a fund and the distribution of that fund are two entirely distinct matters, and it is the conduct of the appellants in regard to the latter operation that is the foundation of this estoppel.

It is further stated that 150 of these claimants notified the Interior Department that they were entitled to participate because their ancestors appeared on the pay rolls of 1843 and 1844.

It is true that Mr. Shipman inclosed such a list to the Interior Department, but it was previous to the determination on January 10, 1896, by the Secretary that those pay rolls should be included, and it was for the purpose of inducing the Secretary to make that decision. Afterwards, when that decision was made, it does not appear that these 150 claimants pressed their claims or said anything at all about it. They maintained their silence equally with the rest of the 272 claimants. If this list of names in Mr. Shipman's letter is enough to prevent the application of the principle in regard to these 150 persons, it can have no effect on the rest of them.

For the foregoing reasons the judgment of the Court of Claims should be affirmed.

WILLIAM H. BUTTON,
Special Attorney.

LOUIS A. PRADT,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 211.—October Term, 1902.

Phineas Pam-to-pee and others, Appellants, vs. The United States. } Appeal from the Court of Claims.

[December 22, 1902.]

On March 18, 1890, Congress passed an act, (26 Stat. 24,) giving to the Court of Claims jurisdiction to try all questions arising out of treaty stipulations between the United States and the Pottawatomie Indians of Michigan and Indiana, unembarrassed by reason of any estoppel supposed to arise from the joint resolution of Congress, approved April 18, 1866, or a receipt in full given by certain Pottawatomie Indians under the provisions of that resolution. Under the authority of this act two petitions were filed in the Court of Claims, one on April 14, 1890, in behalf of "the Pottawatomie Indians of Michigan and Indiana," no individuals being named, by John Critcher, their attorney, his authority being, as stated, an "agreement between said Critcher and the business committee of said Indians, dated September 29, 1887," the other on November 5, 1890, by Phineas Pam-to-pee and thirteen hundred and seventy-one other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney. On January 8, 1891, these two cases were consolidated, and on June 27, 1892, (27 Ct. Claims, 403,) a judgment was rendered against the United States for $104,626. The claimants in each of the cases so consolidated appealed to this court, which on April 17, 1893, affirmed the judgment. (148 U. S. 691.) On April 20, 1893, the mandate was filed in the Court of Claims.

While the judgment determined the amount due from the United States it did not determine to how many or which of the various individual plaintiffs, or in what proportion, the amount thus adjudged to be due from the United States should be paid. The Court of Claims, in its opinion, said (p. 414):

"Congress have recognized, by the very title of the act, a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians."

By this court it was stated (p. 703):

"How the moneys so awarded should be distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition."

And after quoting the language of the court below we further said:

"On the other hand it is contended, with great show of reason, by the petitioners who are represented in case No. 1125 (16842 in the court below), that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently.

"It is to be observed that the court below found as a fact (see finding 10) that the average proportion between the Indians who removed west and those who remained was as 2,812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

"The petitioners, however, number 1,371 in case No. 1125, but the number represented in No. 1133 (16473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1125 that only 91 Indians are actually represented in case No. 1133, and that the other 200 Indians are among those represented in case 1125.

"But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians entitled to distribution are represented by the respective attorneys or agents.

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. (*United States* v. '*Old Settlers*,' *ante*, p. 509.)"

On August 23, 1894, Congress passed an act, (28 Stat. 450,) appropriating money for the payment of judgments of the Court of Claims, including therein the amount of this judgment in favor of the Pottawatomie Indians. On March 2, 1895, it passed a further act, (28 Stat. 894,) directing the Secretary of the Interior to detail or employ an Indian inspector to take a census and prepare a roll of the Pottawatomie Indians of Michigan and Indiana who were entitled to share in such judgment, and appropriated the sum of $1,000 therefor. After an inspector had been appointed under

this act, and while he was engaged in taking the census, counsel for the present petitioners, who was counsel for petitioners in the second of the original suits, addressed a communication to the Secretary of the Interior of date July 27, 1895, representing that such census by reason of the basis upon which it was ordered would omit many Indians entitled to share in the judgment. Before any further instructions could be given, and in August, 1895, the inspector filed in the Interior Department his report and census. Acting upon the suggestions made in the letter of counsel a new inspector was on February 5, 1896, designated to examine and report upon the claims of any parties other than those already upon the census roll, and upon his report, of date March 14, 1896, making some slight additions, payment of the entire amount of the judgment was made, and made per capita, to all the individuals on the revised list. Thereafter, and on April 22, 1899, these petitioners filed their petition in the Court of Claims, alleging in substance that they were entitled to participate in the sum awarded against the United States, and as they had not received their share of those moneys they prayed a judgment therefor. Upon a hearing the Court of Claims decided against them and on May 20, 1901, entered a judgment (36 Ct. Claims, 427,) dismissing their petition, from which judgment this appeal was taken.

Mr. Justice BREWER delivered the opinion of the Court.

There is an apparent hardship in the result of this litigation, but one which we are constrained to believe the plaintiffs are chiefly responsible for, and which can be relieved only by the action of Congress. Two sets of claimants appeared in the former suits, each represented by separate counsel, and after a consolidation the litigation proceeded only so far as to determine the fact of the liability of the government and the extent of that liability, leaving undetermined the individuals entitled to share in the amount awarded against the government or the proper basis of distribution between those so entitled. In the first of the suits ninety-one Indians were, it is said, represented, while the petition in the second suit set forth the names of 1,371 persons whose names and residences were given, and who were alleged to be entitled to share in whatever money should be awarded against the government. The Court of Claims, after finding the amount that was due, in terms declared that it left "the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians." This court affirmed that decision, and in so doing, after saying that there was nothing in the record which would enable them to identify the claimants, added: "Perhaps the necessities of the situation demand that the identifi-

cation of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund." Such being the final orders in the consolidated cases, proceedings for ascertaining the individual beneficiaries were rightfully had in accordance with the directions then made. It is no argument against upholding that which was done to say that some other and more satisfactory procedure might have been ordered. Possibly it would have been better for the court to have appointed a master and proceeded according to the rules of equity in identifying the beneficiaries of the fund. However, it was not so ordered, and both the claimants and the government were instructed and concluded by the decision in respect to the method of identification.

The mandate of this court was filed in the Court of Claims on April 20, 1893, and on August 23, 1894, Congress passed an act appropriating money for the payment of the judgment. The fund thereby became available for distribution. No action, so far as appears, was taken in the Court of Claims or in the Indian department looking to an identification of the parties entitled to this money until after March 2, 1895. Nearly two years had passed and no effort had been made by the petitioners to establish to the satisfaction of the court or the officers of the Indian department their right to be counted among the distributees of this fund. Obviously these petitioners, whose names and places of residence were stated in the second of the original petitions, could if they had seen fit furnished proofs of identification.

After the passage of the act of March 2, 1895, appropriating $1,000 for expenses, an inspector was detailed as agent to take a census and prepare a list or roll. Then for the first time and after he had commenced his work do we hear of any action on the part of these petitioners, and that action consisted wholly of a single letter from their counsel to the Secretary of the Interior. This was the scope of that letter, which was of date July 27, 1895: The instructions given to the agent were that in taking the census he should be guided by a pay-roll made in 1866, upon which there had been a *pro rata* distribution of money awarded by Congress, and to account for all the Indians whose names appeared upon that roll, and also to enroll all who could furnish proof of being their legal descendants. The letter was a protest against these instructions, calling attention to the fact that there were prior rolls, particularly those of 1843 and 1844, which should be taken into account in preparing the new census or list. The writer also attached a list of the names of some, who, so far as ascertained, were, he stated, heirs of persons named on one or other of these rolls, and of other individuals who were also entitled to enrollment. Apparently before any action was taken by the department upon this protest the agent had returned a list or census roll of those found by him entitled to share in the fund.

Nevertheless the contention made in the letter of counsel having been presented to the Secretary of the Interior, he ruled that those persons should be enrolled who were on any of the rolls made during the years from 1843 to 1866, or descended from one upon those rolls. Thereupon a new agent was appointed and directed to ascertain what additions to the list returned by the first agent should be made under the new rulings. The work of this agent was not fruitful in results, as he only reported the names of two persons entitled to be added to the list or roll. Thereafter one was added by the department, and upon the list thus completed the money was paid out per capita. The number to whom distribution was made, being all included in the completed list or roll, was 272. This distribution was made during the month of November, 1896, according to the statement of Chief Justice Nott, in delivering the opinion of the court, although there is no specific finding to that effect. The report of the second agent was dated March 14, 1896. No action appears to have been taken by the petitioners intermediate this report in March, and the distribution in November; none indeed until the filing of this petition on April 22, 1899, more than three years after the report.

The fourth finding in the present suit contains this statement:

"None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them, to wit, 272, whose names are set forth in Schedule A annexed to claimants' request for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844 and 1866."

But in respect to this finding it was stated by Chief Justice Nott:

"The evidence now produced to establish the fact that 272 of the present claimants are direct descendants of the Indians who were upon the rolls in 1843 and 1844 is not altogether satisfactory to the court, but in the absence of countervailing testimony it may be said to present a *prima facie* case."

So the case stands thus: Congress having referred to the Court of Claims an inquiry whether anything was due to "the Pottawatomie Indians of Michigan and Indiana" by reason of treaty stipulations, nearly fifteen hundred individuals appeared in two suits, subsequently consolidated, claiming that there was a large amount due under those stipulations, and representing that they were the parties entitled to the benefit thereof. The result of that litigation was to determine that a certain amount was due to those Indians, but there being no evidence to identify the individuals who came within the description and were entitled to share in the amount found due, the judgment was simply for a recovery of such amount, and it was specially directed that the identification of the individuals entitled thereto should be left to the officers of the Indian department. After two years had passed without any evidence being furnished by individuals of their right to participate in the fund, Congress directed the Secretary of the

Interior to appoint an agent to examine into the matter and prepare a proper roll or list. While such agent was acting a protest was made by the counsel in one of those suits against the basis upon which he was preparing the roll. Although that agent had finished his work the Secretary of the Interior accepted the suggestion of counsel, and directed a new agent to examine and report any names which upon the basis suggested by counsel should be added to the roll already prepared. As the result of the reports of these two agents a roll was prepared containing the names of 272 persons, and the fund was distributed among them.

There is nothing in the record in the way of finding, report or letter tending to show what efforts the first agent made in respect to the matter of identification, what course he pursued or what steps he took, and in respect to the second agent all that is disclosed is that which appears in his report, which details at some length his various efforts to secure evidences of identification of different individuals. In short, it must be assumed, in the absence of any showing to the contrary, that the officers of the government acted reasonably, fairly and with all needed diligence in discharging the duty imposed upon them. While from the present findings it appears that they made a mistake, and did not include all who ought to have been included as beneficiaries, yet their instructions conformed to the suggestions of counsel for petitioners, and there is nothing to show that they did not make a full and honest effort to carry out those instructions. Complaint, therefore, must be upon one of two grounds: Either that the proper course to pursue in the way of identification was not taken, but that objection comes too late, for it was concluded by the prior decision; or that a mistake having been made in the matter of identification the government must assume all the burden of the mistake and pay a second time that which it has once paid in pursuance of the directions of the court. That is really the contention of the petitioners.

They were petitioners in one of the original suits, and contend that they were entitled to share in the fund, and that as the full amount awarded by the court and appropriated by Congress has already been paid to others, they are entitled to a judgment against the government for that which ought to have been paid to them out of the prior appropriation. The Court of Claims finds that of these petitioners 272 ought to have been placed upon the census roll, and were entitled to a share in the fund. The failure to receive their share may be a hardship to these petitioners, but it must be remembered that the method of ascertaining those entitled was prescribed by the court and pursued by the government. Having been so pursued that fund must be considered as properly distributed.

This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the absolute duty is cast upon the defendant to see that the right party is

paid, but a case in which the amount of a fund for distribution was determined, and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in the question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.

To what would any other ruling result? The finding which, evidently, from the opinion of Chief Justice Nott was not very clearly established, that 272, in addition to those already paid, were entitled to a part of the fund, does not conclude other claimants, and if these petitioners should obtain a judgment against the United States, other petitioners might come forward with like claim, and so the government be compelled to pay over and over again, although it had made one payment in compliance with the directions of the court. Further, if there were really more beneficiaries entitled to share in this fund than those who actually received payment, those who were paid received each too much and should return the overplus; and the amount of that overplus would be constantly increased as in successive actions there were added further beneficiaries, for the distribution was, as stated, per capita—a mode of distribution contended for by the petitioners. Petitioners seem to assume that, although the government took the course prescribed by the court in ascertaining the individuals entitled to share in that fund, it assumed all the risk of mistake, however made; and that they could wait until after the government had acted and made the distribution, and that no responsibility rested upon them to furnish evidences of their title. For reasons stated we cannot assent to this view. Where a fund has been created and the mode of distribution prescribed by the court which established the amount of the fund, its disposition in accordance with the course prescribed by the court must be held a finality, and in the case at bar any further relief must be obtained from Congress and cannot be given by the courts.

It is suggested, though not by counsel, that the Court of Claims had no jurisdiction to entertain this action, and that therefore our order should be to reverse the judgment and remand the case with instructions to dismiss for want of jurisdiction. The basis of this suggestion is the contention that the act of March 18, 1890, simply gave to the Court of Claims jurisdiction to determine the sum due the Pottawatomie Indians of Michigan and Indiana, without the power to identify the particular individuals entitled to share in the amount found due, and it is said that this was so decided in the prior case. We do not so understand that decision. The act, so far as material, reads as follows:

"Whereas representatives of the Pottawatomie Indians of Michigan and Indiana, in behalf of all the Pottawatomie Indians of said States, make claim against the United States on account of various treaty provisions which, it is alleged, have not been complied with: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon; power is hereby granted the said court to review the entire question of difference *de novo*, and it shall not be estopped by the joint resolution of Congress, approved twenty-eighth July, eighteen hundred and sixty-six, entitled 'Joint Resolution for the relief of certain Chippewa, Ottawa and Pottawatomie Indians,' nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it."

Two suits were commenced in the Court of Claims, as heretofore stated, and by that court consolidated. In one a certain number of individuals were named as petitioners. In the other it was admitted that ninety-one persons were represented by their authorized attorney, as appeared by agreement between the attorney and their business committee. The court, after consolidating the two actions, proceeded to determine the amount due, and made no finding as to the individuals entitled to share in such amount. But such identification was for want of sufficient evidence to enable the court to determine the question. This is apparent from the opinion of that court in the present case, for it is said by Chief Justice Nott, in delivering that opinion, "It is unfortunate for some of the claimants in the present suit that the evidence upon which they now rely was not before the court then. . . . The court deemed itself bound by the action of the government in recognizing the parties represented by the former suit (that is, one of the two suits consolidated), and accordingly rendered judgment for them, but the court did not undertake to determine who the then existing individual claimants were who were entitled to participate in the distribution."

Again, after quoting from the opinion of this court, he said: "At this point, if the former case had been a similar suit in chancery between ordinary litigants, it would have been referred to a master or referee to ascertain and report as to the individual claimants entitled to recover, and the final decree would not have been entered until a coming in and confirmation or correction of the master's report. The Secretary of the Interior, however, seems to have inferred from language in the opinions of the two courts that he was authorized to proceed and ascertain who those Indians were, and to prescribe the methods for so ascertaining and determining the amount to be distributed to each individual claimant." And after referring to a plea in behalf of these individual claimants on account of their ignorance, added, "but the former case, in which the court might have exercised the discretion of a court of equity and allowed parties to come in even after the decree and assert their rights, is closed; the judg-

ment therein has been satisfied; the claimants stand directly upon their legal rights, and there cannot be one law for the intelligent and another for the ignorant."

And this court, in its opinion, used the language quoted in the preliminary statement of fact. It is obvious from these quotations from the opinions that both the Court of Claims and this court understood that the act gave jurisdiction not only to ascertain the amount due, but also to identify the individuals entitled to share therein, and that the failure to find the latter resulted from a lack of evidence—a lack the plaintiffs endeavor in this action to supply.

But even if the language of the prior opinions of the Court of Claims and this court can be tortured into a different construction, still there can be no question of the jurisdiction of the Court of Claims over the present action. The jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed, and the contention here is—and it is the basis of this suit—that the judgment which was rendered in the prior suit has not been executed. It would be an anomaly to hold that a court having jurisdiction of a controversey and which renders a judgment in favor of A against B had no power to inquire whether that judgment has been rightly executed by a payment from B to C. If the Court of Claims had no authority to inquire into the execution of its judgment it was shorn of a part of the ordinary jurisdiction of a court. The question what is essential in order to confer jurisdiction in this court over the judgments of the Court of Claims was exhaustively examined by Chief Justice Taney in *Gordon* v. *United States*, reported in 117 U. S. 697, and that judgment has been more than once referred to by this court as conclusive of the questions therein considered. (*District of Columbia* v. *Eslin*, 183 U. S. 62; *District of Columbia* v. *Barnes*, *ante*, p. ——.) In that opinion he said (p. 702):

"The inferior court, therefore, from which the appeal is taken, must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

"The award of execution is a part and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party

without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction, yet it is the whole power that the court is allowed to exercise under this act of Congress."

It follows from these considerations that the Court of Claims not only had jurisdiction to find the amount due from the United States to the Pottawatomie Indians of Michigan and Indiana and render judgment therefor, but also to inquire into the question whether that judgment had been duly and properly executed.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S

Supreme Court of the United States.

No. 211.—October Term, 1902.

Phineas Pam-to-pee and others, Appellants, vs. The United States. } Appeal from the Court of Claims.

[December 22, 1902.]

Mr. Justice White dissenting.

It results from the findings of the court below that the petitioners in that court who are appellants, apart from the question of their laches, are entitled to the relief which they seek. This was conceded by the court below in the conclusion of law which it drew from the findings of fact, was not challenged by the government in the argument at bar, and is, besides, not now questioned by this court in its opinion. But the lower court held, and this court now affirms such conclusion, that because of their laches the petitioners are cut off from obtaining that judicial relief to which they would otherwise be entitled. In other words, it is decided that although the power exists in the court to grant relief, its duty is not to exert its lawful powers to that end because the petitioners have so neglected their rights that they are not entitled now to enforce them. From this conclusion I am constrained to dissent, because, in my opinion, there is no power in the court to entertain jurisdiction, and therefore no right in it to decide the question of laches. In other words, I think the plaintiffs in error must be relegated to Congress for relief, not because they have lost their right to redress in the courts by their neglect, but because the wrong which they have suffered is one which can only be remedied by Congress, the courts being without jurisdiction over the subject matter. Whilst both in the opinion of the court and in my view the plaintiffs in error can only obtain relief at the hands of Congress, there is a serious difference in the grounds upon which the conclusion proceeds, for manifestly it is one thing to refer the plaintiffs to Congress because they have lost their rights by neglect, and another to refer them to Congress because that body alone has power over the subject. Because of the difference between these views and the effect which this difference may have on the rights of the parties when their claim for relief is presented to Congress, I deem it my duty to state quite fully the reasons for my dissent.

The history of this controversy was stated in the opinion in *Phineas Pam-to-pee* v. *United States*, (148 U. S. 691.) For the purpose of present clearness, however, the salient facts are again recapitulated.

On the 26th and 27th of September, 1833, by a treaty and articles supplementary thereto, the united nation of Chippewa, Ottawa and Pottawatomie Indians ceded certain lands in Michigan and Illinois to the United States, and agreed to remove within three years west of the Mississippi.

(7 Stat. 431, 442.) Among other payments to be made on account of the cessions, there was to be paid to the Indians under the treaty proper the sum of $280,000, and under the articles supplementary $40,000, in twenty annual installments of fourteen thousand dollars and two thousand dollars respectively.

Appended to the articles supplementary was a provision wherein it was recited:

"As since the signing of the treaty a part of the band residing on the reservations in the Territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at l'Arbre Croche." (7 Stat. 445.)

Only a portion of the Indians embraced by the provision just quoted removed from their reservations to the northern part of Michigan. The others dispersed throughout Michigan and a few settled in Indiana.

From the year 1843 to the year 1865, inclusive, payments were made to the Pottawatomie Indians who had not removed West, and who were deemed to be entitled to the annuity benefits stipulated in the articles supplementary signed on September 27, 1833. These payments were made at the Mackinac agency, and it would seem that the payments embraced Indians who had not removed to the northern part of Michigan, but who had located elsewhere in Michigan and Indiana. A schedule showing the dates of payments, the names of the agents who made them, and the number of Indians to whom the aggregate sums were paid, is annexed in the margin.* The amounts which were paid, as stated in the schedule,

*Year.	*Name.*		*No. paid.*	*Amount.*
1843	Robert Stuart		253	$1,587.50
1844	do		269	1,587.50
1845	Wm. A. Richmond		217	1,587.50
1846	do		204	1,587.50
1847	do		244	1,587.50
1848	do		260	1,587.50
1849	Chas. P. Babcock		260	1,587.50
1850	do		218	1,587.50
1851	Wm. Sprague		229	1,587.50
1852	do		214	1,587.50
1853	Henry C. Gilbert		219	1,587.50
1854	do		236	1,587.50
1855	do		236	1,587.50
1856	do		221	1,587.50
1857	A. N. Fitch		229	1,587.50
1858	do		234	1,587.50
1859	do		253	1,587.50
1860	do		236	1,587.50
1861	De Witt C. Leach		235	1,587.50
1862	do		247	1,587.50
1863	do		246	1,587.50
1864	do		242	1,237.50
1865	Richard M. Smith, principal in currency	$1,587.50		
	do	gold premium in currency 692.24	232	2,279.74

embraced sums deemed to be due under an annuity of sixteen thousand dollars, arising from a treaty made on July 27, 1829, and the annuity of two thousand dollars, mentioned in the articles supplementary of September 27, 1833.

By a treaty signed in June, 1846, (9 Stat. 833,) all the Indians (Chippewas, Ottawas and Pottawatomies) embraced in the treaty of 1833, who had removed to the West and retained their tribal organization, were designated as the Pottawatomie Nation.

In accordance with a joint resolution of July 28, 1866, (14 Stat. 370,) the sum of $39,000 was paid to the Chippewa, Ottawa and Pottawatomie Indians in Michigan and Indiana. This sum was paid to the "chiefs, headmen, heads of families, and individuals without families" of the Indians in question, within the Mackinac agency, there being 230 persons falling within the classes above designated, each one of the distributees receiving an equal share, that is, $169.50. The money thus paid was receipted for as in full and complete satisfaction of all payments of every kind and nature, past, present or future, in favor of the persons to whom the payment was made and those by them represented, against the United States or the Pottawatomie Nation of Indians. Despite the receipt in full thus given, the Indians to whom the payment in question had been made continued to assert a claim against the United States on account of what was alleged to be still due to them under treaty stipulations. Finally, by the act of March 19, 1890, (26 Stat. 24,) the Court of Claims was authorized "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." It was provided that the payment of $39,000 heretofore referred to should not be given the finality which its terms imported, and appellate jurisdiction over any judgment which might be rendered was conferred upon this court. The second section of the act reads as follows:

"SEC. 2. That said action shall be commenced by a petition stating the facts on which said Pottawatomie Indians claim to recover, and the amount of their claims, and said petition may be verified by a member of any 'Business Committee' or authorized attorney of said Indians as to the existence of such facts, and no other statements need be contained in said petition or verification."

Under this act two petitions were filed in the Court of Claims. The first of these petitions was entitled *The Pottawatomie Indians of Michigan and Indiana* v. *The United States;* the second was entitled *Phineas Pam-to-pee and* 1,371 *other Pottawatomie Indians of Michigan and Indiana* v. *The United States.* The right asserted in both of these petitions was based on the averment that the petitioners were entitled to recover a stated sum from the United States, because they had not received their due proportionate share of the annuities or other sums due the Pottawatomie Nation

of Indians. However, although both the petitions substantially stated the same facts as constituting the cause of action, the amount claimed in each petition was widely different. This arose from the fact that in the first petition it was asserted that about 300 of the Indians who had not removed West were entitled to their proportionate share of the tribal annuities under the articles supplementary to the treaty of 1833, it being alleged that those who had removed West were about 4,000 in number. The claim was that the distribution should proceed upon that basis; whilst in the second petition it was asserted that the Indians who had not removed West were 1,200 in number, and that distribution should be made in the ratio that 1,200 bore to 4,000, the latter being the number of Indians asserted to have gone West. Although, however, there was a difference in the claims of the two petitions as to the amount of the indebtedness owing by the United States, in both petitions recovery was only sought of an aggregate sum as due to the Pottawatomie Indians in Michigan and Indiana entitled to take under the articles supplementary to the treaty of 1833, and in neither petition was there any allegation as to the proportionate sum of the total amount claimed to which any particular Indian was entitled, nor did either petition purport to state the representative capacity in which any particular Indian was entitled to take his share of the whole fund, if any.

The two petitions referred to were consolidated and heard together. The Court of Claims decided that there was due to the Pottawatomie Indians of Michigan and Indiana, after deducting payments made, the sum of $104,626, and entered judgment for that sum. (27 Ct. Cl. R. 403, 421.)

The "just proportion" which the court thus found to be due to the Pottawatomie Indians of Michigan and Indiana, in the aggregate, entitled to share in the funds of the Pottawatomie Nation, was arrived at first by ascertaining from various reports the number of the Indians who had moved West under the treaty of 1833, and then by ascertaining the number of Indians entitled to share who had remained in Michigan. This latter number was arrived at by averaging the number of such Indians as shown by various payments made from 1843 to and including 1866, as manifested in the schedule of such payments heretofore excerpted or referred to.

The court was of opinion that under the jurisdictional act of 1890 it could only find and decree the aggregate amount due all the Indians entitled to participate in the fund found due, and that it was not incumbent upon it to determine who were the particular Indians entitled to take such aggregate amount and the distributive share to which each particular Indian was entitled. It said:

"Congress has recognized by the very title of the act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant,

leaving the question of distribution to that department of the government which by law has incumbent on it the administration of the trust, which in legal contemplation exists between the United States and the different tribes of Indians."

On appeal this court affirmed the judgment of the Court of Claims. (148 U. S. 691.) After determining that there was no error in the judgment under review, in so far as it fixed the aggregate amount due, the question was then considered whether it was the duty of the court to ascertain what particular Indian was entitled to share in the fund and the amount of his or her distributive share. On this subject, after quoting approvingly the reasoning of the Court of Claims, by which that court sustained its action under the jurisdictional act of 1890, in finding only the aggregate amount due and leaving the distribution of the fund to the executive officers of the government, and after pointing out that the suit was brought to recover only such aggregate amount, and that there was no finding made by the court below which would justify a decree distributing the fund, the court said (p. 705):

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entiled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. (*United States* v. *Old Settlers, ante,* 427.)"

By the deficiencies appropriation act of August 23, 1894, (28 Stat. 424, ch. 307,) various sums were appropriated, "For payment of judgments of the Court of Claims," one item reading as follows: "To the Pottawatomie Indians of Michigan and Indiana, $104,626.00." In the Indian Department appropriations act of March 2, 1895, (28 Stat. 876, ch. 188,) was contained the following, italics not in the original (p. 894:)

"Miscellaneous.

* * * * * *

"That the Secretary of the Interior is hereby authorized and directed to detail or employ an Indian inspector to take a census of the Pottawatomie Indians of Indiana and Michigan who are entitled to a certain sum of money appropriated by Congress to satisfy a judgment of the Court of Claims in favor of said Indians. *And for the purpose of making the payment to the Pottawatomie Indians of Indiana and Michigan* of the $104,626, appropriated by the last Congress to satisfy a judgment of the Court of Claims, there is hereby appropriated the sum of one thousand dollars."

In the Indian Department appropriations act of August 15, 1894, (28 Stat. 286, ch. 290,) there was appropriated $6,243.90 as the "amount due certain Pottawatomie Indians of Indiana and Michigan for their propor-

tion due June 30, 1893, June 30, 1894, and June 30, 1895, "of the perpetual annuities ($22,300.00) as ascertained by the judgment of the Supreme Court of the United States pronounced in the case of the Pottawatomie Indians of Michigan and Indiana against the United States, on April 17, 1893, and which annuities were not embraced in the judgment aforesaid." (Ib. 295.) An appropriation of $2,081.30 for the proportion of the perpetual annuities due the Pottawatomie Nation for the year ending June 30, 1896, was made by the Indian Department appropriations act of March 2, 1895, (28 Stat. 876, 885, ch. 188.) It was recited, as in the previous statute, that the amount of the perpetual annuities had been ascertained by the judgment of this court on April 17, 1893. By a proviso the Commissioner of Indian Affairs was directed "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." In the Indian Department appropriations act of June 10, 1896, (29 Stat. 321, ch. 398,) there was appropriated to pay the same Indians $2,081.30 as their proportion of the perpetual annuities for the year ending June 30, 1897, and also the sum of $41,626.00, as a "final settlement by capitalizing their proportion of the perpetual annuities in question." Reference was made to the judgment of this court as in the prior appropriation acts.

The action of the Secretary of the Interior in respect to the disbursement of the moneys so appropriated is summarized in finding of facts numbered III made by the Court of Claims in this action. It reads as follows:

"In June, 1895, the Secretary of the Interior ordered and directed that a census of the Indians be made under the act 2d March, 1895, (28 Stat. L. 894.) The census roll was prepared under instructions of the Commissioner of Indian Affairs, dated June 8, 1895—approved by the Secretary of the Interior June 15, 1895—by John W. Cadman, and is known as the 'Cadman census roll.' While the agent was so engaged in taking the census, John B. Shipman, Esq., attorney of record in the case of *Pam-to-pee* v. *United States*, addressed a communication to the Secretary of the Interior, dated July 27, 1895, representing that such census, by reason of the manner in which it was being taken, would omit many Indians entitled to be paid under the judgment of the court.

"Inclosed in the said letter of John B. Shipman was a list containing the names of over one hundred and fifty of the claimants herein, the names of their ancestors and number on the pay-roll of 1843 and 1844 being given as stated *in* the letter.

"Before further instructions were given by the Secretary of the Interior the agent Cadman, in August, 1895, made and returned and filed in the Interior Department the census so made by him.

"After this roll had been prepared many applications for enrollment were received by the Commissioner of Indian Affairs, based upon the state-

ment that while such applicants were not on the roll of 1866, they were on prior rolls from 1843 to 1866, or were the descendants of such persons. The question was then submitted to the Secretary of the Interior for an opinion as to whether the rolls from 1843 to 1866 should be considered in connection with the enrollment of those who were entitled to participate in the distribution of the $104,626 awarded by the Court of Claims.

"On January 10, 1896, the Secretary of the Interior made his final decision in regard to the Indians who should be enrolled and paid under the judgment of this court and the appropriation of Congress. Marcus D. Shelby, a special Indian agent, was designated by the Commissioner of Indian Affairs to examine and report upon the claims of the several parties alleging to be descendants of the Pottawatomie Indians of Indiana and Michigan, who were permitted by supplemental clause to the treaty of September 27, 1833, to remain East, and for whom the Court of Claims rendered a decision in their favor of $104,626, June 27, 1892. The instructions given to the agent by the Commissioner were dated February 5, 1896. The agent so designated proceeded to Michigan and reported the result of his investigation, bearing date March 14, 1896. The report so made was accepted by the Secretary of the Interior as substantially correct, and the amount appropriated by Congress in satisfaction of the judgment of this court (28 Stat. L. 450,) as well as other funds appropriated to pay the Indians upon treaties mentioned in the petitions in said suits, (the sum paid being $118,554.52,) paid to the persons upon the roll made by Cadman, after adding thereto two names on the recommendation of Shelby in closing his report as persons mentioned on the census roll by Inspector Cadman but not found on the roll of 1866. Later one more was added by the department. The money was paid to the Indians as communal owners, that is to say, it was paid *pro rata* to every living member of that portion of the tribe entitled to participate in the funds and not *per stirpes*."

The report of agent Shelby was made a part of the findings of the court. The manner in which he proceeded to ascertain who were entitled to be added to the Cadman roll was thus summarized in the opinion below:

"His report to the Commissioner of Indian Affairs, March 14, 1896, shows that he traveled through the country where these Indians resided or were supposed to reside, and notified them, so far as he could, to appear and prove their cases. In his report he said: 'I found these people very badly scattered, and as they do not frequent post offices, the notices prepared for me to be posted in the various post offices to give them notice of my coming were of but little value. In nearly every instance on reaching the vicinity of these Indians I had to take teams and drive to their homes. I got, however, the newspapers to publish the principal points I would visit.' A number appeared, some of whom claimed because their ancestors' names were on the rolls of 1843 and 1844, others because they had Pottawatomie blood in their veins. All of these applicants were rejected for various reasons, some because their proof was insufficient, some because they or their forefathers had allied themselves with other Indian tribes, some because their fathers' names had been erroneously placed, in the opinion of Indian agents, upon the former rolls and had been dropped from subsequent rolls."

There was no finding that any notice had been given to Mr. Shipman of the movements of agent Shelby, nor was it found that any of the Indians whose names were furnished by Mr. Shipman to the Secretary of the Interior ever had actual notice of the investigation which the representative of the Secretary of the Interior made intermediate the receipt of the instructions of February 5, 1896, and the return of Shelby to Washington in the early part of the following month.

On April 22, 1899, the present action was instituted in the Court of Claims, the petition being filed on behalf of Phineas Pam-to-pee and 362 other named Indians, alleged to be a portion of the Indians in whose favor the judgment for $104,626 was rendered. The proceedings in the prior actions were set out and the passage of the various appropriating acts to which allusion has already been made was averred, as also that distribution had been made of the greater part of the funds among 273 Indians, while nothing had been paid to the petitioners. Judgment was prayed for such proportionate amount of the various funds as the evidence might show the petitioners were entitled to, to be "allotted and awarded to them severally."

After issue joined, the cause was tried and the Court of Claims filed findings of facts and conclusions of law. Finding III has heretofore been set out. Finding IV reads as follows:

"None of the Indians, parties in or represented by the present suit were paid as aforesaid. A large number of them, to wit, 272, whose names are set forth in Schedule A annexed to claimants' request for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844 and 1866. A portion of the Indians who remained in Michigan as coming within the exemption treaty of September 27, 1833, were represented in both petitions in the cases of *The Pottawatomie Indians* v. *The United States* and *Pam-to-pee and other Indians* v. *The United States.*"

The Court of Claims thus expressly found that a large number of the Indians, claimants in this suit, had received nothing in the distribution made by the Secretary of the Interior, although some of these Indians were parties to or represented in the consolidated case, and were also represented by Mr. Shipman before the Secretary of the Interior, and were entitled to share in such distribution. In addition, from the facts found concerning the investigation made by Agent Shelby prior to the distribution referred to, the court below expressed the opinion that the investigation by Agent Shelby "was hurried and to the judicial mind unsatisfactory." Moreover, the court, considering the judgment rendered in the previous consolidated case and the acts of Congress making the appropriation to pay the judgment of $104,626, arrived at the conclusion that "there is not a line in the judgment of this court or in any statute of Congress which empowered or authorized the Secretary to dispose of the fund." It was decided that the suit must be dismissed, because the petitioners had

been guilty of such laches in pressing their claims after the appropriation was made and whilst the distribution was pending, as to debar them from all right to relief at the hands of the court.

It is difficult for me to determine precisely on what ground the theory of laches was predicated. In one aspect of the opinion below it would seem to have been rested upon the theory that, as the distribution of the money was a judicial act and not an administrative one, it was incumbent on the petitioners to have invoked the power of the court to control the Secretary of the Interior and compel him to distribute the money rightfully; on the other, that although the petitioners had formally notified the Secretary of their claims, they were nevertheless guilty of laches because they did not foresee that that officer would distribute the money without notice to them, and after an investigation which the court itself finds to have been wholly unsatisfactory to the judicial mind.

In the argument at bar the error which was committed in the distribution in question as shown by the facts found by the court below is not disputed. On the contrary, in addition to the error in the distribution so shown it is expressly conceded that the distribution was besides fundamentally wrong, because it was made on an illegal basis. Thus it is said in the brief on behalf of the United States:

"It appears from the record in this case that the judgment was distributed not *per stirpes* but *per capita*. That is to say, all the Indians discovered were allowed to participate equally in the fund, irrespective of the generation to which they belonged. The son of an Indian who appeared on one of the pay rolls was allowed only the same amount which each of, say, five grandchildren of an Indian on one of the pay rolls was allowed. They should have taken by representation. The aggregate of the five shares of the five grandchildren mentioned should have equaled the share of the son of the original payee. The consequence is that the whole judgment was distributed on a wrong basis. The payments became due to individuals at various times. The record discloses no reason why the estate of the individual to whom such payment was due is not entitled to the whole of such payment.

"If any one on the pay rolls at the time the annuities became due died without heirs who could inherit, there is no reason why this share should not escheat. It is perfectly evident that a mere enumeration of the Indians, and an equal division among them, does not fulfill the requirements of the situation."

The deduction which the government makes from the admission just quoted being that the petitioners are not entitled to relief, because relief cannot be administered without making parties defendant all those to whom the distribution was made and securing an entire readjustment and settlement of the rights of all parties.

This court now affirms the judgment of the court below. In effect the application of the rule of laches made by the lower court is approved, and

the decisive result of the laches is additionally sustained by the conclusion that, although it was not shown that any notice was served upon the petitioners prior to the distribution made by the Secretary of the Interior, the presumption that the officers of the government discharged their duty raises the legal inference that before making the payment such full and fair investigation had been made by the executive officers as warranted the paying out of the money in the manner in which it was disbursed. This court now, moreover, holds that as the judgment in the consolidated case, although it only found the amount due to the Pottawatomie Indians in Michigan and Indiana as a body, had remitted the question of what Indians were entitled to such gross sum to the proper executive department of the government, the executive officers who made the distribution in effect acted under the order of the court.

The jurisdiction to entertain the action can alone be predicated upon the following considerations: First, the act of Congress of 1890, by the authority of which the original judgment in the consolidated case was rendered, or upon the judgment thus rendered; or, second, the appropriation made by Congress to pay such judgment and the acts of Congress in connection therewith.

By section 1066 of the Revised Statutes it is provided that the jurisdiction of the Court of Claims "shall not extend to any claim against the government . . . growing out of or dependent on any treaty stipulations entered into . . . with the Indian tribes." Clearly, therefore, aside from the jurisdiction conferred by the act of 1890, there was no power in the courts to consider and determine the question of the proper distribution of the funds due the Pottawatomie Nation of Indians, or to fix the just proportion to which the Pottawatomie Indians of Michigan and Indiana were entitled. Now, the act of 1890, which conferred jurisdiction on the Court of Claims to determine the sum due the Pottawatomie Indians of Michigan and Indiana out of the tribal funds, was susceptible of being construed in one of two ways: First, that it alone delegated the power to determine the aggregate amount of the just proportion of the tribal funds due to the Indians in question, or that it conferred such authority, and, in addition, imposed the duty of ascertaining the particular Indians who were entitled to share in the distribution when the total sum for distribution was judicially determined. That the statute embraced only the first power, that is, of fixing the aggregate amount, seems to me to conclusively result from the judgment rendered by the Court of Claims and affirmed by this court. It cannot be doubted that the Court of Claims expressly decided that the authority conferred by the act of 1890 related only to determining the aggregate amount, and not to the ascertainment of the particular persons entitled to share in the same and the amount they were respectively entitled to take. True, this court, in its opinion, in 148 U. S. 691,

referred to the absence of evidence as to who were entitled to the distributive shares, and the impossibility of rendering a decree on that subject, yet it nevertheless, in affirming the judgment, expressly approved the conclusion of the Court of Claims limiting the judgment to the determination of the aggregate amount and leaving the distribution of that sum, when Congress should thereafter appropriate therefor, to the action of the executive officers of the government.

It follows that the jurisdictional power conferred by the act of 1890 was exhausted by the decree of affirmance, and the subsequent distribution of the gross sum when the appropriation had been made was solely a matter within the jurisdiction of Congress and the administrative officers of the government. That such was the legislative conception of the effect of the judgment of affirmance rendered by this court, is conclusively shown by the appropriation to pay the money and the other legislative acts concerning that sum and other sums awarded to the Indians in question, since such acts treat of the ascertainment of the individuals entitled to the gross amount found due as a purely administrative question, with no intimation whatever that it was conceived that the administrative discretion which the acts imposed was subject to be reviewed and controlled by the judicial branch of the government. To repeat, the jurisdiction, under the act of 1890 having been exhausted and the judgment fixing the aggregate sum having expressly remitted the distribution to the administrative branch of the government, it follows that no support for the jurisdiction over the present suit, either in the Court of Claims or in this court, can be founded upon the act of 1890 or the judgment rendered thereunder. Did, then, jurisdiction arise from the act of Congress appropriating the sum necessary to pay the judgment referred to or from the other appropriation acts to which reference has heretofore been made?

From what has already been stated, it would seem that a negative answer must be given to this question. In view of the terms of section 1066 of the Revised Statutes, I think it is clearly requisite that the intention of Congress to commit to the courts the ultimate regulation and control of a distribution *prima facie* intended to be made or expressly directed to be made among unascertained beneficiaries by the executive officers of the government, should be plainly made to appear before it should be held that such authority was conferred on the judiciary. Now there had been no claims presented to Congress on behalf of Pottawatomie Indians seeking individual relief; but the claims urged were on behalf of the whole body of Pottawatomie Indians in Michigan and Indiana, who asserted the nonpayment of their just proportion of the tribal annuities. On twenty-four different occasions, during as many years, Congress, through the Interior Department, had ascertained and determined who were the individuals constituting the Pottawatomie Indians of Michigan and Indiana, entitled

to a just proportion of tribal annuities, and neither in the jurisdictional act of 1890 nor in any of the appropriating acts was language used importing that it was deemed that a necessity existed for a judicial ascertainment of the particular individuals who might possess a right to share in the "just proportion" referred to. The various acts in which the appropriations in question were embodied made provision for numerous other appropriations, in compliance with stipulations embodied in treaties made with sundry Indian tribes, and as in the particular appropriating paragraphs in question payments were merely directed to be made to unascertained individuals constituting a body of Indians, there was certainly no clearly, implied or expressed intention that the payments should be subject to the ultimate control of the courts or that the disbursement of the funds should be under any other direction or control than that of the Secretary of the Interior, who had made prior payments of a similar character upon his own ascertainment of the individual beneficiaries. As a matter of fact, also, a contrary intent is clearly manifested in several of the appropriating paragraphs. Thus, in the act of March 2, 1895, (28 Stat. 894,) the duty is expressly imposed on the Secretary of the Interior to take a census of the Indians who were entitled to the fund appropriated by the previous Congress to pay the judgment of $104,626, thus implying that there had not been any provision in the judgment of the Court of Claims or of this court for the ascertainment of such individual beneficiaries; and one thousand dollars was appropriated "*for the purpose of making the payment,*" obviously to those who, by a proper performance of the duty imposed on the Secretary of the Interior, should be found to be embraced within the class. So, also, in the same act, (28 Stat. 885,) the absolute control which Congress deemed it was exercising for the distribution of the sums found due to the Indians as a body was evinced in the direction to the Commissioner of Indian Affairs "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." Bearing in mind that the appropriated sums in question, though a "just proportion," were in fact tribal funds, and that the expenditure of tribal funds is peculiarly regulated by Congress and committed to the Indian Department, (Rev. Stat. sec. 2086, *et seq.*) it seems to me beyond reasonable controversy that Congress intended that the ascertainment of the particular beneficiaries entitled to the funds and the distribution among them should be performed solely by its own agencies.

The decision in *United States* v. *Weld*, (127 U. S. 51,) is not an authority opposed to the views just expressed. In that case a judgment had been rendered by the Court of Commissioners of Alabama Claims, in favor of

certain claimants, and they had received a portion of such judgment. The amount of the gross fund due all claimants had been fixed in the statute, what should be deducted had been specifically declared, and it had also been explicitly provided that the balance which would necessarily result should be distributed to the judgment creditors. The holding of this court was simply that creditors, whose claims against the fund had been adjudicated by the commission provided for in the statute, possessed a right to sue in the Court of Claims to recover their share of a portion of the fund which had been improperly retained by the Treasury Department.

Being of opinion that the judgment below should be reversed for want of jurisdiction, and that the sole remedy of the petitioners lies in an appeal to the fairness and sense of justice of the legislative branch of the government, it would, of course, be out of place for me to discuss the grounds upon which the laches is held to apply. It is manifest, however, that the reasoning by which I have been led to the conclusion that the court was without jurisdiction, if sound, is in absolute conflict with the theory that laches can be imputed to the petitioners because they did not invoke the aid of the court below to control the discretion to distribute the money vested in the Secretary of the Interior by the acts of Congress making the appropriations. This ground of laches being put out of view, the only other theory upon which it can be rested is, that although the petitioners formally presented their claim to the Secretary of the Interior and called his attention to their rights, they yet lost them because they did not foresee that that officer would, without notice, proceed to distribute the money to the wrong persons and upon a basis which the government now, whether advisedly or not I need not consider, declares to have been absolutely unjust and illegal.

I am authorized by Mr. Justice McKenna to say that he joins in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.